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THE SECOND YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

By Manley O. Hudson

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A year ago, when an attempt was made in this Journal to describe the inauguration of the Permanent Court of International Justice and the beginning of its work,[1] it seemed that a new experiment in international relations was on trial. But such has been its progress in two years that the court now appears to be one of the established institutions in our international life. The Foreign Offices have begun to regard it as a sort of international fixture. It is fast accumulating a record of achievement indispensable to the international law of the future, and the court now bids fair to be permanent in influence as in name.

Two years ago a fear was entertained that the new court might be neglected by the governments, and might be given little to do. The writer shared this fear to some extent, anticipating that "the new Permanent Court of International Justice may not be presented with a crowded docket for some time to come."[2] Some assurance was found in the early history of the Supreme Court of the United States,[3] which did not have a contested case until its sixth term. But the fear has already proved to have been groundless, for the court's reception has greatly exceeded the general expectations. Not only have numerous questions come before the court in the two first years, but the existence of the court has influenced the diplomatic handling of other questions. It is notable also that since the court was created, no question has been referred to a tribunal of the Permanent Court of Arbitration,[4] though various special arbitrations have been arranged. It now seems im-

[1] "The First Year of the Permanent Court of International Justice," by Manley O. Hudson, this Journal, Vol. 17 (1923), p. 15.

[2] "The Permanent Court of International Justice," by Manley O. Hudson, 35 *Harvard Law Review* 245 (January, 1922). See, however, Mr. Hammarskjöld's valuable article, "The Early Work of the Permanent Court of International Justice," 36 *Harvard Law Review* 704.

[3] The record of the early terms of the United States Supreme Court is in 2 Dallas' Reports, 399 ff. Professor Borchard seems to deny that this record affords any analogy. See *Proceedings of Academy of Political Science in the City of New York*, Vol. X, p. 137.

[4] The agreement for the Norwegian-American arbitration was signed on June 30, 1921, before the judges of the new court had been elected; and strictly it may be contended that that case was not before a tribunal of the Permanent Court of Arbitration.

probable that the new court will be neglected because of a preference for specially chosen judges.[5]

When its first (extraordinary) session was ended on March 24, 1922, no question had yet been submitted to the Permanent Court of International Justice. During 1922 and 1923, nine questions have been disposed of. The first three, relating to the International Labor Organization, may be said to have been constitutional questions, of a sort which may frequently arise as the development of international organization proceeds in the future. The first (ordinary) session of the court, from June 15 to August 12, 1922, was occupied with these three questions.[6] The other six questions have all involved the application of conventional law, the issues arising out of differences in the interpretation of treaties. The fourth question, relating to the Tunis-Morocco nationality decrees, necessitated a second (extraordinary) session from January 8 to February 7, 1923. The Eastern Carelian question, the case of the *S. S. Wimbledon*, the question about the German settlers in Poland, and the question about the acquisition of Polish nationality, were all disposed of at the second (ordinary) session from June 15, 1923, to September 15, 1923. The question as to the boundary between Czecho-Slovakia and Poland called for a third (extraordinary) session from November 12, 1923 to December 6, 1923.

THE TUNIS-MOROCCO NATIONALITY QUESTION

On August 11, 1922, the British Government requested that the following item be placed on the agenda of the Council of the League of Nations: "Dispute between France and Great Britain as to the nationality decrees issued in Tunis and Morocco (French zone) on November 8, 1921, and their application to British subjects, the French Government having refused to submit the legal questions involved to arbitration." The matter came before the Council on October 2, 1922, when Lord Balfour (Great Britain) reported that "friendly conversations" had taken place, as a result of which he asked the Council to refer to the Permanent Court of International Justice the question "whether the dispute referred to above is or is not, by international law, solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Cove-

[5] But see "Strength and Weakness of the New International Court," by Professor Edwin M. Borchard, 4 *Illinois Law Quarterly* 67, 69 (February, 1922). Mr. Borchard's suggestion that as the judges' views become known, governments will be more reluctant to submit cases to the court, seems to neglect the fact that the opinions and decisions are not handed down in the names of the particular judges.

[6] For comment on these opinions, reference may be made to the earlier article in this JOURNAL, Vol. 17 (1923), pp. 18–23, and to Mr. Hammarskjöld's article in 36 *Harvard Law Review* 704, 717. See also "*L'Organisation Permanente du Travail, Sa Compétence en Matière Agricole*," by Maurice Guerreau, 29 *Revue Générale de Droit International Public*, 223; and especially the discussion by Professor Mahaim in 3 *Revue de Droit International et de Législation Comparée*, 3d ser., p. 503, and by Sir Cecil Hurst in the *British Year Book of International Law for 1923–24*, p. 172.

nant)."[7] M. Hanotaux (France)[8] agreed to the suggestion, and the Council adopted a resolution proposed by Lord Balfour in that sense. The definitive text of the resolution was fixed on October 4.[9] It states that "the Council takes note that the two governments have agreed that if the opinion of the court upon the above question is that it is not solely a matter of domestic jurisdiction, the whole dispute will be referred to arbitration or to judicial settlement under conditions to be agreed between the governments."

By the resolution as redrafted on October 4, the Council requested "the two governments to bring this matter before the Permanent Court of International Justice", after having "decided to refer" it "for opinion", and having directed the Secretary General to "communicate" these paragraphs of the resolution to the court. On October 4, 1922, the Secretary General of the League of Nations transmitted to the Registrar of the court a copy of the resolution of the Council "for the information" of the court. This was not treated as a request for an advisory opinion as required by Article 72 of the rules of court, but such a request was sent on November 6.[10] The question was before the court for an advisory opinion, therefore, though the Council left it to the French and British Governments to "present statements of their respective cases directly to the court," and asked that the court "consult the convenience of the two governments, so far as its rules of procedure permit, with regard to the manner in which the subject should be considered and its opinion be given."

The President of the court invited the French and British Governments to state whether an extraordinary session of the court should be summoned; if so, what date would be suitable; and what were their "special desires" as to procedure.[11] The two governments suggested January 8 as a date for an extraordinary session, and fixed November 25 as the date for the submission of cases, and December 23 as the date for the submission of counter-cases.[12] The British Government designated Mr. George Mounsey as agent, and the Right Honorable Sir Douglas Hogg, K. C., M. P., His Majesty's Attorney General, and the Right Honorable Sir Ernest Pollock, Bart., K. B. E., K. C., M. P., as counsel; and the French Government designated M. Mérillon as agent, and Professor de Lapradelle as *agent-adjoint*. Oral arguments were made before the court by representatives of the two governments. Indeed, although the matter was before the court as a request for an advisory opin-

[7] *League of Nations Official Journal*, November, 1922, p. 1207.

[8] M. Bourgeois was named in the resolution as printed in the *League of Nations Official Journal*, 1922, p. 7.

[9] *League of Nations Official Journal*, November, 1922, p. 1209.

[10] The correspondence between the Secretary General and the Registrar is published in *Acts and Documents*, No. 2, pp. 248 ff. (This volume is in the publications of the court, Series C.)

[11] *Acts and Documents*, No. 2, p. 263.

[12] These documents have not been published by the court. The French *contre-mémoire*, of 222 pages, contains a valuable collection of documents.

ion, it was dealt with very much as if it had been a contested case between Great Britain and France. This view of the situation was stated by M. de Lapradelle, as follows: "Though, on the face of it, we are here simply, to give you information to enable you to reply to the Council's request for an opinion, we have before us . . . what in reality amounts to an arbitration." He also spoke of the advisory procedure applied in this case as "merely a device."[13] The arguments before the court consumed five days, and twenty meetings were held during the session of the court. The opinion was handed down on February 7.

The court was very scrupulous in confining itself to the question before it, insisting throughout that it was dealing with the nature of the dispute, not with its merits. This attitude was punctiliously maintained, in spite of the frequent insistence of M. de Lapradelle that the question was submitted "on its merits, so closely interconnected are form and substance in this matter."[14] Moreover, the French Government in its draft of conclusions had stated that "the court has not only the right but the duty, especially in view of the fact that it is solely a question of formulating an opinion, to examine the whole development of the questions submitted by the parties and to furnish all the decisive arguments for the ultimate deliberation."[15]

For the British Government, it was contended that since each government relied "partly on questions of the existence or abrogation of treaties and of the construction of the terms of such treaties", the dispute was not by international law solely a matter of domestic jurisdiction. For the French Government, it was contended that "the sovereign right of a nation to legislate upon nationality questions within its own territory governs the situation"; that its application could be prevented only by a recognized rule of international law or by a provision of international treaty; that Great Britain had no rights in Tunis except those conferred by treaties with France, and these were limited in Tunis as in France; that the French protectorates over both Tunis and Morocco, which had been recognized by other nations, demanded "the progressive assimilation of the customs and laws of the protectorate to those of the protecting country;" and that no special limit exists on the power to make nationality imposed *jure soli* "prevail over any other nationality based on the *jus sanguinis*."

The Court dealt with the matter "in the light of the provisions" of paragraph 8 of Article 15 of the Covenant. The following passage from the opinion may be of assistance in future efforts to apply those provisions, which are held not to lend themselves to "an extensive interpretation:"

> The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon

[13] See *Acts and Documents*, No. 2, pp. 52, 53.
[14] *Ibid.*, p. 56.
[15] *Ibid.*, p. 241.

the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the court, in principle within this reserved domain.

The Aaland Islands case [16] was cited as showing that a matter in dispute does not derive "international character calculated to except it from the application of paragraph 8 of Article 15" merely as a result of its being brought before the League of Nations, nor as a result of appeals by a party "to engagements of an international character in order to contest the exclusive jurisdiction of the other" party.

The court examined the French protectorates over Tunis and Morocco, and concluded that while a state possessed exclusive jurisdiction in regard to nationality questions in its own territory, the question whether this extends to protected territory is a question of international law. The French Government contended that treaties relied on by Great Britain had lapsed, "by virtue of the principle known as the *clausula rebus sic stantibus*", and this too was held to be a question of international law. The two governments also disagreed on the effect of declarations relating to Tunis, made by Great Britain,[17] so that a question of international law was involved. There was a similar disaccord as to the effect of the arrangement of September 18, 1897, as to Tunis,[18] and of the Franco-German convention of November 4, 1911,[19] as to Morocco. Great Britain also relied on the most-favored-nation clause in the Anglo-French arrangement of September 18, 1897, in order to assert a benefit under Article 13 of the Franco-Italian consular convention of September 28, 1896;[20] while France contended that the most-favored-nation clause was limited to economic matters, and that the convention of September 28, 1896, was unavailable because of its synallagmatic character.[21] This too was held to be a question not solely within the domestic jurisdiction of France. For these reasons the court unanimously, the judge of French nationality concurring, reached the opinion that the dispute was not by international law solely a matter of domestic jurisdiction.

On the announcement of this opinion, at the public sitting of February 7, 1923, the agent for the French Government declared that "the French Government respectfully accepts a decision which does not give satisfaction to all its conclusions", and asked the court "to place on record that the French Government proposes to the English Government that the case should be submitted on its merits to the Permanent Court of International Justice."[22]

[16] See the *League of Nations Official Journal*, 1920, p. 249.

[17] See especially the Order in Council of December 31, 1883. 74 *British & Foreign State Papers* 694.

[18] 89 *British & Foreign State Papers* 40.

[19] 104 *British & Foreign State Papers* 948.

[20] 88 *British & Foreign State Papers* 720, 733.

[21] Cf. the American restriction on interpretation of the most-favored-nation clause. Hyde, *International Law*, Vol. II, p. 73.

[22] *Acts and Documents*, No. 2, p. 13.

The agent for the British Government stated that his government would "give careful consideration to any proposals which the French Government may see fit to address to them." When the court again met on June 15, 1923, the President announced the receipt of a letter from the French Minister at The Hague and a letter from the British Chargé d'Affaires at The Hague, both under date of June 7, 1923, informing him that an amicable arrangement had been concluded on May 24 closing the matter, and that the two governments had therefore decided to stop the proceedings before the court.[23]

An American writer, Mr. Charles Noble Gregory, has sharply criticized the court for its opinion in this case,[24] stating that the court was "controlled by no code", had showed "little of conservatism", and had struck an "exotic note." His statement that the judges fell fast asleep during the argument was admittedly based on "private information" and is obviously the kind of statement which has no place in a serious discussion of a judicial opinion. But his particular criticism seems to be that the court did not sufficiently rely on precedent, and he finds a "departure from English and American precedent." It would be exceedingly strange if an international tribunal should acknowledge itself bound to follow "English and American precedent" or practice. Moreover, the writer failed to refer to any available precedents to which the court might have referred. Indeed, it was a situation where precedents were lacking, though the court did refer to the Aaland Islands case in support of its view. Mr. Gregory called the opinion a "decision", and this may have been one of the reasons for his neglecting the limits within which the court acted, and for his permitting himself to "look to the uncharted course of the high tribunal with real solicitude."

[23] The British Chargé d'Affaires communicated copies of the notes exchanged embodying the terms of the amicable arrangement. *Document C. 422. M. 186. 1923. V.* These terms are:

a) The French Government agreed to make arrangements before January 1, 1924, whereby a British national who is the child born in Tunis of a British national who was himself born there shall be entitled to decline French nationality, it being understood, however, that this right will not extend to succeeding generations.

b) A child born in Tunis of a British national born elsewhere than in Tunis is not claimed to possess French nationality, and French nationality will not be imposed on any British national born in Tunis before November 8, 1921, without an opportunity being afforded to him to decline it.

c) No attempt will be made to impose Tunisian nationality instead of French nationality on British nationals in Tunis.

d) Neither government abandons its point of view maintained either in the diplomatic correspondence or in the preliminary proceedings at The Hague; nor will the principle adopted in the present agreement be applicable elsewhere than in Tunis.

e) The application to British subjects of the similar nationality decrees promulgated in Morocco (French zone) will not for the present give rise to further proceedings at The Hague, since this question has at present no practical importance. On this question, the two governments reserve their rights. See *British Treaty Series*, No. 11 (1923), Cmd. 1899.

[24] In this JOURNAL, Vol. 17 (1923), pp. 298–307.

THE EASTERN CARELIA QUESTION

On October 14, 1920, a peace treaty was concluded at Dorpat between the Republic of Finland and the Russian Socialist Federal Soviet Republic, the text being in the Finnish, Swedish and Russian languages.[25] Articles 10 and 11 of this treaty refer to the "autonomous territory of Eastern Carelia", and confer certain rights on the "Carelian population of the Governments of Archangel and Olonetz", "which shall enjoy the national right of self determination." At the general meeting of the peace delegates on October 14, 1920, a declaration was inserted in the *procès-verbal* on behalf of the Russian delegation, by which certain rights were guaranteed to the Carelian population of the Governments of Archangel and Olonetz (Aunus).[26] On December 31, 1920, ratifications of the treaty were exchanged at Moscow, but the *procès-verbal* of the exchange does not mention the declaration.[27] On the same date a *procès-verbal* of signature of a French text of the treaty was drawn up, referring to "all relevant acts" in addition to the treaty.

In the latter part of 1921, the Carelian population rose in insurrection and on November 26, 1921, the Finnish Government addressed a letter to the Council of the League of Nations, complaining of the non-execution of the guarantees, and asking the Council to consider the advisability of instituting an inquiry with a view to subsequent discussion. The matter came before the Council of the League on January 14, 1922, and the Council expressed a willingness "to consider the question with a view to arriving at a satisfactory solution if the two parties concerned agree", and further expressed the "opinion that one of the interested states, member of the League,[28] which is in diplomatic relations with the government of Moscow, might ascertain that government's intentions in that respect."[29]

In pursuance of this resolution, the Esthonian Government exchanged notes with the Russian Government and invited the latter to submit the question to the Council "on the basis of Article 17 of the Covenant." But the steps taken "led to no result, as the Soviet Government adopted the attitude that the question of Eastern Carelia was to be regarded as one of a purely domestic character."[30] The Russian Government seems also to have contended that the treaty and declarations of Dorpat "were only intended

[25] *League of Nations Treaty Series*, Vol. 3, p. 5.

[26] An English translation is published in *League of Nations Treaty Series*, Vol. 3, p. 76. On the general question, see "*La Question de la Carélie Orientale*," by Professor R. Erich, in 3 *Revue de Droit International et de Législation Comparée*, 3d ser., p. 1.

[27] The text of the *procès-verbal* is published in *League of Nations Treaty Series*, Vol. 3, p. 79.

[28] Statements had been submitted by the Esthonian, Latvian, Lithuanian, and Polish governments.

[29] *League of Nations Official Journal*, 1922, p. 108.

[30] See memorandum by the Secretary General, of February 1, 1923, in *League of Nations Official Journal*, 1923, p. 343.

as information regarding a situation already existing" under a decree of June 8, 1920, and to have regarded the French text as inaccurate.[31]

On November 10, 1922, the Finnish Government addressed a letter to the Council of the League of Nations (received on January 17, 1923) expressing the desire that the Council "request the Permanent Court of International Justice to adjudicate not only upon the legal aspect of the question but also upon the other differences of opinion to which this question has given rise." When this request came before the Council on February 1, 1923, consideration of the question was adjourned to the Council's next session.[32] On April 20, 1923, the matter again came before the Council and Mr. Enckell on behalf of Finland submitted a statement expressing the view that an opinion by the court would "introduce a pacific influence on the parties," and could afford a basis for a renewal of the offer of good offices by other states. He also submitted a very frank and able memorandum by Professors Chydenius, Erich and Hermanson of the University of Helsingfors.[33] On April 21, 1923, the Council decided to ask the court for an advisory opinion on the following question:

> Do Articles 10 and 11 of the treaty of peace between Finland and Russia signed at Dorpat on October 14, 1920, and the annexed declaration of the Russian delegation regarding the autonomy of Eastern Carelia constitute engagements of an international character which place Russia under an obligation to Finland as to the carrying-out of the provisions contained therein?[34]

In addition the Secretary General was authorized to inform the court of the action taken by the Council, to submit all the relevant documents, to give all necessary assistance in the examination of the question, and "to make arrangements to be represented if necessary at the court."[35] On April 27, the Secretary General addressed a formal request to the court.

Notice of this request was sent, in accordance with Article 73 of the rules of court, to all members of the League and to other states mentioned in the Annex to the Covenant, including the United States. The Registrar was also directed to notify the Russian Government.[36] A telegraphic reply was

[31] See statement by M. Enckell, in *League of Nations Official Journal*, 1923, p. 222.

[32] *League of Nations Official Journal*, 1923, p. 222.

[33] Reprinted in *League of Nations Official Journal*, 1923, p. 661. See, also, the opinions of Professors de Visscher of Ghent, Lie of Christiania, and Berlin of Copenhagen, in a brochure published by the "Carelian Delegation" in 1922.

[34] *League of Nations Official Journal*, 1923, p. 578.

[35] This statement has been incorporated in all of the recent resolutions requesting advisory opinions.

[36] The Registrar's letter of May 19, 1923, to the Russian People's Commissary for Foreign Affairs, stated: "Notice is hereby given in accordance with the principle, laid down in the rules of court, according to which governments and international organizations, which are likely to be able to furnish information on a question submitted to the court for an advisory opinion, shall receive notice of such question." Cf., Rules of court, Article 73.

received from M. Tchitcherin, the Russian Peoples' Commissary for Foreign Affairs, dated June 11, 1923, stating that the Russian Government found it impossible to take any part in the proceedings which were without legal value, resuming the position previously taken by the Russian Government and referring to an official communication of June 18, 1922, repudiating "the claim of the so-called League of Nations to intervene in the question of the internal situation of Carelia."[37]

When the court met to consider the matter, it intimated to M. Erich, the agent of Finland, that it would be glad to have his views on the question of its competence. The argument by M. Erich on June 22 and 26 dealt with both the competence of the court and the merits of the Russian arguments. On July 23, 1923, the court handed down the conclusions of the majority of seven judges (in which judges Weiss, Nyholm, de Bustamante and Altamira did not share) which are referred to by the majority as an "opinion" and published as No. 5 in the *Collection of Advisory Opinions*. The majority analyzed very carefully the nature of the dispute, saying that there was no question about the existence of the treaty of Dorpat, but that the "parties" differed as to its interpretation and divided on whether the declaration constituted part of its terms. The question whether the declaration formed part of the obligations into which Russia entered was said to be a "question of fact". The court found itself asked to give an opinion bearing on an actual dispute between Finland and Russia. "Answering the question would be substantially equivalent to deciding the dispute between the parties." It was somewhat vaguely declared that "the case is one under Article 17 of the Covenant," apparently to show that Russian consent was necessary. As Russia had never consented to any submission of the dispute, the majority concluded that it was impossible for the court to give the opinion requested.

For various reasons, also, the majority thought it "very inexpedient" for the court to attempt to deal with the question. The attendance of witnesses might be necessary. It was doubtful whether the court had available materials sufficient for a judicial conclusion upon the question of fact as to what the parties did agree to. The necessary investigation would require the consent and cooperation of both parties.

Yet the court did not "regret that the question has been put, as all must now realize that the Council has spared no pains in exploring every avenue which might possibly lead to some solution with a view to settling a dispute between two nations."

Apart from any appraisal of the conclusion at which the court arrived, it seems indisputable that the judges acted under a very proper sense of the limitations surrounding judicial action. Moreover, the dignity and force of advisory opinions is protected by the court's attitude toward its function. It is a welcome declaration that "the court, being a court of justice, cannot,

[37] For the text, see *Advisory Opinion No. 5*, pp. 12–14.

even in giving advisory opinions, depart from the essential rules guiding their activity as a court."[38]

This "opinion" was communicated to the Council of the League of Nations, and to all members of the League. On September 27, 1923, the Council took note of the court's action, but entered a *caveat* "that the opinion expressed by the court in connection with the procedure described by Article 17 of the Covenant could not exclude the possibility of resort by the Council to any action, including a request for an advisory opinion from the court, in a matter to which a state non-Member of the League and unwilling to give information, is involved, if the circumstances should make such action necessary to enable the Council to fulfil its functions under the Covenant of the League in the interests of peace."[39]

On September 24, 1923, the question came before the Fourth Assembly of the League of Nations, which noted the declaration of the Finnish delegation that "the Finnish Government, in the absence of any decision or any contrary opinion pronounced by any international jurisdiction, maintains its right to consider the clauses of the treaty of Dorpat and the supplementary declarations relating to the status of Eastern Carelia, as agreements of an international order." The Assembly further requested the Council to continue to collect information relating to the question, "with a view to seeking any satisfactory solution rendered possible by subsequent events."[40]

THE S. S. WIMBLEDON CASE

On January 16, 1923, the British, French, Italian and Japanese Governments, acting conjointly as the Principal Allied and Associated Powers designated by the treaty of Versailles of June 28, 1919, made "application" under Article 40 of the statute of the court and Article 35 of the rules of court, asking the court to give judgment, whether the German Government be "present or absent," that "the German authorities wrongfully refused on March 21, 1921, free access to the Kiel Canal of the steamship *Wimbledon*," a British steamship chartered by the French armament firm *Les Affréteurs Réunis*, and that the German Government make reparation for the losses incurred in consequence of this action. The application set forth "a succinct statement of facts, an indication of the claim and the address selected" by the applicants at The Hague.[41]

The application stated that the *Wimbledon* was not permitted to pass through the Kiel Canal while proceeding to Danzig with a cargo of military material; and that on March 23, 1921, the refusal had been reaffirmed, on protest by the French Ambassador at Berlin, the German Government con-

[38] *Advisory Opinion, No. 5*, p. 24.

[39] *Document C. 642. (1). 1923. V.* The discussion in the Council is reported in *procès-verbal 19/1* of the 26th session.

[40] *League of Nations Official Journal, Special Supplement No. 11*, p. 29.

[41] Following Article 35 of the rules of court.

tending that the cargo of the *Wimbledon* consisted of war material destined for Poland, then at war with Russia, and hence its transit across German territory was forbidden by neutrality regulations in force. The applicants based their claim on Article 380 of the treaty of Versailles of June 28, 1919.[42] To vest jurisdiction in the court, whether the German Government be "present or absent", the applicant Powers relied on Article 386 of the treaty of Versailles[43] and Article 37 of the statute of the court.[44]

On May 22, 1923, the Polish Government applied to intervene in the case under Article 62 of the statute and Articles 58 and 59 of the rules of court, as one of the parties to the treaty of Versailles whose rights and material advantages guaranteed by Article 380 of that treaty had been violated. Arguments on this application to intervene were heard by the court on June 25, 1923, when the Polish Government abandoned its claim to intervene under Article 62, and its claim for special damages, and placed its application under Article 63 of the statute. Such intervention was allowed by the court in an opinion handed down on June 28.

The German Government does not seem to have contested the court's jurisdiction under Article 386 of the treaty of Versailles. That article provides for appeal to a "jurisdiction instituted for the purpose by the League of Nations." On September 16, 1920, the German Government itself suggested appeal to such a jurisdiction, in connection with the affair of the *S. S. Dorrit*.[45] Article 37 of the statute of the court, to the protocol establishing which Germany is not a party, provides that "when a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the court will be such tribunal." But this can hardly be said to have made the court the "jurisdiction instituted for the purpose by the League of Nations." It is not necessary to consider the effect of Article 22 of the Convention on the Régime of Navigable Waterways of International Concern, concluded at Barcelona, on April 20, 1921.[46]

On January 28, 1922, in the course of the diplomatic correspondence which followed the stopping of the *Wimbledon*, the German Government, denying the competence of the Conference of Ambassadors to decide such a question, alluded to "the court of justice instituted expressly by Article 386 of the treaty of Versailles for such differences of opinion", and demanded that the

[42] "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality."

[43] The first paragraph reads: "In the event of any violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations."

[44] "When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the court will be such tribunal."

[45] In a letter from the President of the German delegation at Paris to the President of the Conference of Ambassadors, reprinted in the applicant Powers' *Memoire*, p. 22.

[46] See *League of Nations Treaty Series*, Vol. VII, p. 35; Vol. XI, p. 406.

matter be placed before "the jurisdiction provided for in the treaty."[47] This demand was later agreed to by the Conference of Ambassadors, which on November 16, 1922 "accepted that the affair be put before the Permanent Court of International Justice at The Hague."

Under Article 31 of the statute, Professor Schücking was named by Germany as a national judge to sit in the case. It is notable that he participated in the opinion admitting the intervention of Poland. But no question seems to have arisen as to Poland's having a national among the judges, as an intervening party.

The applicants submitted a case on March 17, 1923, and a reply on May 18, 1923; and the respondent submitted a counter-case on April 20, 1923, and a rejoinder on June 15, 1923. The British Government was represented before the court by Sir Cecil Hurst; the French Government by Professor Basdevant; the Italian Government by Commendatore Pilotti; the Japanese Government by M. Ito; the Polish Government by M. Olechowski, and the German Government by M. Schiffer. The German Government raised a point as to the *locus standi* of the four applicants, but the court thought this clear.

The facts were not in dispute. The parties had not agreed, however, as to whether Poland and Russia were still at war on March 21, 1921. An armistice and preliminary peace treaty had been signed at Riga on October 12, 1920,[48] and put into force on November 2, 1920, and a definitive treaty of peace was signed at Riga on March 18, 1921, but ratifications were not exchanged until April 30, 1921.[49] The question therefore as to when the state of war ended, was extensively discussed in diplomatic correspondence and in the case and counter-case. But the majority of the judges found it unnecessary to consider the point.

The chief problem raised related to the construction of Article 380 of the treaty of Versailles, and it is this problem on which the court divided by nine to three, in handing down a decision on August 17, 1923. The majority decided that the clear effect of the article was to make the Kiel Canal an international waterway, open equally to vessels of commerce and war vessels belonging to nations at peace with Germany. While disposed to give the limitation on Germany's sovereign power a restrictive interpretation, the "plain terms of the article" were not to be destroyed. The régimes of the Suez and Panama Canals were reviewed to demonstrate that the passage of war vessels in time of war was not regarded as incompatible with the neutrality of the riparian sovereign. Germany was held to have no duty to refuse access to the *Wimbledon*, but a definite treaty duty to allow it.

Judges Anzilotti and Huber found Article 380 to be dependent on the existence of a state of peace; that there was no intention to deprive Germany of power to take necessary measures to protect her paramount interests in

[47] See the applicant Powers' *Memoire*, p. 29.
[48] *League of Nations Treaty Series*, Vol. IV, p. 7.
[49] *Ibid.*, Vol. VI, p. 51.

event of war or neutrality; that Article 380 must be read with other Articles of Part XII; and that Germany was free to take non-arbitrary measures necessary to protect her interests as a belligerent or neutral power. In a separate dissenting opinion, Professor Schücking found that Article 380 imposed a servitude and was therefore to be interpreted restrictively with a view to protecting the vital interests of the servient state. He urged also that Germany's duties as a neutral toward Russia had not been affected by the treaty of Versailles, and that as the cargo of the *Wimbledon* had been despatched by a Polish mission in Salonika, consigned to the naval base of the Polish state in Danzig, it was to be considered as a convoy[50] and Germany owed Russia a duty to forbid its passage through the Kiel Canal.

The court pronounced Germany to have been wrong in refusing access to the Kiel Canal to the *S. S. Wimbledon*; that Article 380 precluded Germany's applying the neutrality order of July 25, 1920;[51] that the German Government should make good the prejudice sustained, to the amount of 140,749.35 French francs, to be paid within three months, with interest at 6% from the date of the judgment. As to costs, the court refused to vary the rule of Article 64 of the statute, leaving each party to bear its own costs. The satisfaction of the judgment has not yet been announced.

Like many cases of interpretation, this case represents a choice by the court of one of two possible constructions to be put upon a text. The reasons for selecting the construction chosen are not of compelling force, and there were probably certain pragmatic tests in the minds of the judges which were not brought out into the open. In this respect, the court must resemble most national courts, and the judge's function differs only in degree from that of the legislator or treaty-maker whose selection is less limited.

The case is notable, however, for four things. It is the first exercise of the court's jurisdiction in a contested case between states, for in all other instances the court has been giving advisory opinions. It is the first exercise of the court's compulsory jurisdiction conferred by special treaties. It is the first case in which a national judge has participated. And it is the first case in which a state has intervened under the procedure laid down in the statute.

GERMAN SETTLERS IN POLAND

On November 9, 1921, the Secretary General of the League of Nations received a telegram from the Germanic League of Bydgoszcz in Poland, informing him that several thousand Germanic farmers of both Polish and German nationality were about to be evicted from their farms by the Polish Government.[52] In view of the urgency, the procedure outlined as to minority pe-

[50] See the Hague Convention of 1907, respecting the rights and duties of neutral Powers and persons in case of war on land, Articles 2 and 7. 2 Malloy, *Treaties*, pp. 2297, 2298.

[51] The order is to be found in *Reichs-Gezetzblatt*, 1920, No. 158, p. 1469.

[52] The matter had been previously discussed in the Conference of Ambassadors.

titions in the Council resolutions of October 25, 1920,[53] and June 27, 1921,[54] was followed and the petition was both communicated to the Polish representative and referred to a committee consisting of the Belgian, Italian, and Japanese members of the Council. This committee reported to the Council on May 17, 1922, and the Council invited M. Askenazy, the Polish representative, to "consider, in conjunction with the Secretary-General, the various questions of law raised in the report, in order to enable the Council to decide whether, and if so, on what questions, the Permanent Court of International Justice should be asked to give an opinion."[55] Meanwhile, the Polish Government accepted various suggestions for the suspension of administrative or judicial measures changing the situation.

The matter was again considered by the Council on July 20, 1922[56] and September 9, 1922,[57] and on the latter date the Council requested the Secretary General to summon forthwith a committee of jurists to study the legal questions concerning the contracts of the German colonists established by the former German colonization commission, as well as the question of the interpretation of Article 4 of the Polish minorities treaty of June 28, 1919. This committee was asked to report at the current session of the Council. MM. Botella (Spain) and Fromageot (France), Sir Cecil Hurst (Great Britain), and Dr. van Hamel, Director of the Legal Section of the Secretariat, composed the committee. Their report[58] came before the Council on September 30, 1922, and was communicated to the Polish Government. On December 7, 1922, the Polish Minister for Foreign Affairs communicated the views of his government, which declined to accept the report of the jurists. On February 2, 1923, the Council decided to request the opinion of the court, and on February 3, 1923, the Council adopted the following resolution:[59]

> The Council of the League of Nations having been apprised of certain questions regarding the following facts:
>
> (a) A number of colonists who were formerly German nationals, and who are now domiciled in Polish territory previously belonging to Germany, have acquired Polish nationality, particularly in virtue of Article 91 of the treaty of Versailles. They are occupying their holdings under contracts (*Rentengutsverträge*) which although concluded with the German colonization commission prior to the armistice of November 11, 1918, did not receive an *Auflassung* before that date. The Polish Government regards itself as the legitimate owner of these holdings under Article 256 of the treaty of Versailles, and considers itself entitled to cancel the above contracts. In consequence, the Polish authorities

[53] *Minutes of Council*, 10th session, p. 33.
[54] *Ibid.*, 13th session, pp. 51, 235.
[55] *League of Nations Official Journal*, June, 1922, pp. 555, 702.
[56] *Ibid.*, August, 1922, pp. 806, 917.
[57] *Ibid.*, November, 1922, pp. 1181, 1293.
[58] *Ibid.*, November, 1922, p. 1299.
[59] *Ibid.*, March, 1923, pp. 240, 395.

have taken certain measures in regard to these colonists by which the latter will be expelled from the holdings which they occupy;

(b) The Polish authorities will not recognize leases conceded before November 11, 1918, by the German Government to German nationals who have now become Polish subjects. These are leases over German state properties which have subsequently been transferred to the Polish state in virtue of the treaty of Versailles, in particular of Article 256:

Requests the Permanent Court of International Justice to give an advisory opinion on the following questions:

(1) Do the points referred to in (a) and (b) above involve international obligations of the kind contemplated by the treaty between the United States of America, the British Empire, France, Italy, Japan and Poland, signed at Versailles on June 28, 1919, and do these points come within the competence of the League of Nations as defined in that treaty?

(2) Should the first question be answered in the affirmative, the Council requests the court to give an advisory opinion on the question whether the position adopted by the Polish Government, and referred to in (a) and (b) above, is in conformity with its international obligations.

The Secretary-General is authorized to submit this request to the court, together with all the relevant documents, to explain to the court the action taken by the Council in this matter, to give all assistance necessary in the examination of the question, and, if required, to take steps to be represented before the court.

By a formal request of March 2, 1923, the court became seised of the matter. On April 18, 1923, the Council acted on a request of the Polish Government to "confirm" paragraph (b) of its resolution of February 3, "in order that it might be stated with the absolute clearness prescribed by Article 72 of the rules of court." To this end, it was stated "that paragraph (b) refers exclusively to the case of a special category of colonist farmers, namely, those who occupy holdings in virtue of leases contracted before the armistice and still unexpired and who subsequently obtained after the armistice amortization contracts (*Rentengutsverträge*) for these holdings."[60] This decision was duly communicated to the court.

Notice of the request for an advisory opinion was communicated to all members of the League, to other states mentioned in the Annex to the Covenant, and to the German Government. On August 2 the court heard statements by Count Rostworowski and Sir Ernest Pollock on behalf of Poland, and by M. Schiffer on behalf of Germany. From these statements and the documents submitted, it appeared that Poland had acted on Article 256 of the treaty of Versailles of June 28, 1919, to enact the law of July 14, 1920, substituting the treasury of the Polish state for the German state on the land registers and authorizing the expulsion of persons who occupied under contract with the German state or crown. The two questions before the court related to (1) the competence of the Council to take cognizance of the matter under the Polish minorities treaty, and (2) the Council having been found

[60] *League of Nations Official Journal*, June, 1923, pp. 558, 637.

competent, the right of the settlers to continue to hold the lands they occupy.

On September 10, 1923, the court handed down a unanimous opinion. It first held that the Council was competent under paragraph 2 of Article 12 of the Polish minorities treaty and had properly exercised its competence in requesting the advisory opinion. No question arose therefore as to the court's jurisdiction under paragraph 3 of Article 12 of the Polish minorities treaty. The necessity for consideration of Article 256 of the treaty of Versailles was only incidental to the necessity for considering questions under the minorities treaty, and hence did not affect the competence of the Council.

As to the second question, the court held that the armistice of November 11, 1918, had not invalidated the contracts under consideration, for the cession of German territories to Poland had not been effective until January 10, 1920, when the treaty of Versailles came into force. The holders under *Rentengutsverträge* had not acquired legal ownership, before *Auflassung*, but had valid and enforceable contracts for which consideration had been paid. Such a holder was therefore said to be a purchaser who had acquired a *jus ad rem* which after *Auflassung* became a *jus in re*. Under the German law[61] the state could be sued in the courts to enforce this right. "The fact that there was a political purpose behind the colonization scheme cannot affect the private rights acquired under the law." Such private rights were unaffected by the change of sovereignty, and were protected against the "virtual annulment" attempted under the law of July 14, 1920, by the equality provisions of the minorities treaty. The treaty of Versailles had not diminished this protection, and neither it nor the armistice had forbidden the Prussian state from proceeding to confirming the acquired rights with an *Auflassung* issued after November 11, 1918.

As to the leases (*Pachtverträge*) concluded prior to November 11, 1918, the same reasoning led to the conclusion that they "were not affected by the transfer of sovereignty, and that they remain in force unless they have expired or have been legally superseded by *Rentengutsverträge*." Moreover, the Prussian state had not been precluded from granting, prior to the passing of the territory to Poland, a *Rentengutsvertrag* to a holder of a *Pachtvertrag* granted prior to the armistice, and such a *Rentengutsvertrag* should be respected by Poland.

The court was therefore of opinion that (1) the points referred to did involve international obligations of the kind referred to in the minorities treaty and so came within the League's competence as there defined; and (2) the position adopted by the Polish Government was "not in conformity with its international obligations."

This opinion was duly transmitted to the Secretary-General of the League of Nations on September 15, who communicated it to the members of the League and to other states named in the Annex. It came before the Council on September 25, 1923, and the Council "invited the Polish Government to

[61] *German Code of Civil Procedure, Introductory Act*, Article 4.

communicate to it, before the next Council session, information showing what measures the Polish Government proposes to take in order to settle the question of these colonists."[62] Acting on this invitation, the Polish Government on December 1, 1923, addressed a letter to the Secretary General of the League of Nations, suggesting a "practical solution", involving a pecuniary settlement between the Polish Treasury and the dispossessed colonists, and a withdrawal of orders of expulsion against colonists in respect of whom judgments have not been carried into effect. This letter was communicated to the Council on December 8, 1923.

ACQUISITION OF POLISH NATIONALITY

The Germanic League of Bydgoszcz submitted to the Council of the League two memoranda in connection with the telegram of November 9, 1921. The second of these, dated November 12, 1921, dealt with the interpretation of certain provisions of the Polish minorities treaty of June 28, 1919. This was referred to the Council committee which dealt with the questions raised by the same petitioner with reference to German settlers in Poland, and later also to the committee of jurists who studied the latter question.[63] On December 7, 1922, the Polish Minister for Foreign Affairs stated that as regards Article 4 of the Polish minorities treaty, the Polish Government could not alter its interpretation of that article so long as the Germans gave evidence of a tendency to avail themselves of it for a totally different purpose from that of assuring individual interests. Poland also contended that Article 4 had not been placed under the guarantee of the League of Nations.[64]

When the matter came before the Council on February 2, M. Askenazy informed the Council that negotiations with reference to the question were in progress at Dresden, between the German and Polish Governments.[65] For this reason, the Council accepted a suggestion of M. da Gama (Brazil) that the question be adjourned pending the result of these negotiations. On July 4, 1923, the matter again came before the Council, and the Brazilian representative reported that the Polish Government had informed the Secretary-General on June 26 that a basis for agreement had been found at Dresden, and on this ground action was postponed. On July 6, 1923, the German Government informed the Council that it did not foresee the possibility of a speedy settlement by direct negotiation. On July 7, 1923, M. de Modzelewski (Poland) withdrew his request for adjournment of the question, and asked the Council, before referring any question to the court, to seek the views of other states bound by similar minority treaties—Czecho-Slovakia, Roumania, and the Serb-Croat-Slovene Kingdom. But

[62] *Document C. 637. 1923. 1.*

[63] See *League of Nations Official Journal*, June, 1922, pp. 555, 702; August, 1922, pp. 806, 917; and November, 1922, pp. 1181, 1297, 1300.

[64] *Ibid.*, March, 1923, p. 396.

[65] *Ibid.*, March, 1923, p. 396.

this was not agreed to by the Council, which decided to ask the court for an advisory opinion on the questions:

> (1) Is the League of Nations competent to deal with the question of Article 4 of the treaty of June 28, 1919 between the Principal Allied and Associated Powers and Poland?
>
> (2) If the League of Nations is competent, what is the precise interpretation of that article?

The precise text was left to the President's redaction. The Polish representative took "note of the Council's resolution", and said he would "bring it to the notice" of his government.[66] The resolution was later drafted to read as follows:[67]

> The Council of the League of Nations having received notice of the following question:
>
> The Polish Government has decided to treat certain persons, who were formerly German nationals, as not having acquired Polish nationality and as continuing to possess German nationality, which exposes them in Poland to the treatment laid down for persons of non-Polish nationality, and, in particular, of German nationality:
>
> On the one hand, on the ground that these persons were born in the territory which is now part of Poland, their parents having been habitually resident there at the date of this birth, it is maintained that in virtue of Article 4, paragraph 1, of the treaty of June 28, 1919, between the Principal Allied and Associated Powers and Poland, they are *ipso facto* Polish nationals and consequently, enjoy all the rights and guarantees granted by the provisions of the said treaty to Polish nationals belonging to racial, religious or linguistic minorities;
>
> On the other hand, the Polish Government considers itself entitled not to recognize these persons as Polish nationals, if their parents were not habitually resident in the above-mentioned territory, both on the date of birth of the person concerned and on the date of the entry into force of the above-mentioned treaty, namely, January 10th, 1920. It is, consequently, maintained that these persons cannot legally enjoy the guarantees granted by the treaty:
>
> *Requests the Permanent Court of International Justice to give its advisory opinion, if possible during the present session,* on the following questions:
>
> (1) Does the question regarding the position of the above-mentioned persons, in so far as they may belong to racial or linguistic minorities arising out of the application by Poland of Article 4 of the treaty of June 28, 1919, between the Principal Allied and Associated Powers and Poland, fall within the competence of the League of Nations under the terms of the said treaty?
>
> (2) If so, does Article 4 of the above-mentioned treaty refer solely to the habitual residence of the parents at the date of birth of the persons concerned, or does it also require the parents to have been habitually resident at the moment when the treaty came into force?

[66] See *League of Nations Official Journal*, August, 1923, pp. 934–5. Apparently the concurrence of the Polish representative was not necessary. See Lord Robert Cecil's remarks with reference to the expropriation by the Roumanian Government of the property of Hungarian optants, *League of Nations Official Journal*, August, 1923, p. 905.

[67] *Ibid.*, August, 1923, p. 999.

> The Secretary-General is authorized to submit this request to the court, together with all documents concerning the question, to inform the court of the action taken by the Council in the matter, to give all necessary assistance in the examination of the case, and, if necessary, to arrange to be represented at the court.

The court became seised of the question by a letter of the Secretary-General of July 11, 1923. Notice was given to all members of the League, to other states mentioned in the Annex, and to the German Government.[68] The court heard oral statements by Count Rostworowski, on behalf of Poland, and by M. Schiffer on behalf of Germany. On August 25, the court was informed of the Roumanian Government's desire to be heard and September 3 was set as the date; but the time was considered by Roumania to be too short, and the court did not extend it owing to the advanced state of its session and the desire of the Council that the question be disposed of at that session.

On September 15, 1923, the court handed down a unanimous opinion,[69] though Lord Finlay added some "observations" on one of the questions involved. The court first expressed the opinion that the matter was within the competence of the League of Nations, denying Poland's contentions that only Polish nationals could constitute a protected minority and that Articles 3 to 6 of the minorities treaty were not included in the guarantee of the League of Nations established by Article 12. Lord Finlay concurred in these conclusions, but would have preferred "that the court should not merely have based its answer to the Polish contention as to competency on the view that the minority contemplated by Article 12 may be one of inhabitants simply, but that it should also have pointed out that . . . the Polish case fails even if the minority were to be taken on the basis of *ressortissants*." [70]

The court then expressed the opinion that Article 4 of the Polish minorities treaty refers "only to the habitual residence of the parents at the date of birth of the persons concerned." The Polish Government had contended that "of the individuals of German origin born in this territory, only those can claim Polish nationality whose parents were habitually resident there" both on January 10, 1920, and on the day of the birth of the individual. The court thought that such an interpretation would "amount to an addition to the text" which had plainly synchronized birth and residence; that

[68] Though Article 73 of the rules of court did not require that notice be sent to Germany, and though Germany might not have a *locus standi* with reference to ordinary questions arising under the Polish minorities treaty, the court's action in sending such notice in this case would seem to have been a proper exercise of its discretion. But in its letter of December 1, 1923, addressed to the President of the Council, the Polish Government seems to have objected to the court's hearing the German Government on the ground that Germany "would not in any way be regarded as an interested party."

[69] Judge Moore took part in the deliberations and concurred in the conclusions, but was forced to leave The Hague before the terms of the opinion were finally settled.

[70] *Advisory Opinions, Series B, No. 7*, p. 26.

it would have the effect of depriving of Polish nationality a person born in Poland of parents habitually resident there at the time, simply because his parents were dead on January 10, 1920. The clause of the treaty "leaves little to be desired in the nature of clearness," and the additional condition contended for would require a reconstruction of the text.

This advisory opinion was duly transmitted to the Secretary-General of the League of Nations who on September 18, 1923, communicated its text to all members of the League and other states mentioned in the annex. On September 27, 1923, the Council "adopted" the advisory opinion of the court, though M. Skirmunt (Poland) seems to have abstained from voting.[71] At that time, also, the British Government raised certain further questions about the interpretation of Article 3 of the Polish minorities treaty.

The advisory opinion relating to the German settlers in Poland and that relating to the acquisition of Polish nationality represent a constructive and judicial application of the new body of international law contained in the minorities treaties. The court has not only taken account of the purpose and function of those treaties. It has also grasped the practical considerations which condition the success of this innovation. With a narrow and destructive attitude on the part of the court, these treaties might have met with the same failure and miscarriage as the minority provisions in the treaty of Berlin. But there is no trace of such an attitude in these opinions. Due regard is apparent for the necessities of the governments in the new states of Eastern Europe, while at the same time the appreciation of the ends to be served by the treaty provisions is such as to build a confidence among the minority peoples who must depend on them. The opinions constitute a contribution to international law worthy of a John Marshall.

THE JAWORZINA QUESTION

The Ambassadors at Paris of Great Britain, Italy and Japan and the Minister of Foreign Affairs of France, acting as the "Conference of Ambassadors", decided on July 27, 1923, to request the Council of the League of Nations to suggest a solution of the Jaworzina question, relating to the delimitation of the frontier between Poland and Czecho-Slovakia in that part of the territory of Spisz where the Jaworzina district is situated. The question had been before the Conference of Ambassadors for many months, and in referring it to the Council, the Conference stated that it would welcome a submission of the legal question involved to the Permanent Court of International Justice. The Council began to consider the matter on September 20, 1923. Dr. Benes (Czecho-Slovakia) declared that "the fact that the matter was before the League of Nations would certainly appease any disquiet," but insisted on the urgent nature of the problem and asked for a reference to the Permanent Court of International Justice. M. Skirmunt (Poland) likewise agreed to such a reference. On September 27, 1923, the

[71] See *procès-verbal 19/1* of the 26th session of the Council.

Council decided to ask the court for an advisory opinion on the following question:

> Is the question of the delimitation of the frontier between Poland and Czechoslovakia still open, and, if so, to what extent; or should it be considered as already settled by a definitive decision (subject to the customary procedure of marking boundaries locally, with any modifications of detail which that procedure may entail)?

The court became seised of this matter by reason of a letter of the Secretary-General of September 29, 1923. The court met in extraordinary session on November 12, 1923, to consider its opinion. The Polish Government was represented before the court by M. Jean Mrozowski, President of the Supreme Court of Poland, and Professor Joseph Blociszewski; Czecho-Slovakia by Professor Jan Kremar, and Dr. Krno. A unanimous opinion was handed down on December 6, 1923, by which the court held that "the question of the delimitation of the frontier between Poland and Czecho-Slovakia has been settled by the decision of the Conference of Ambassadors of July 28, 1920, which is definitive, but that this decision must be applied in its entirety."

In the statement of the question by the Council, a summary of the main contentions of Poland and Czecho-Slovakia had been placed before the court. Originally, it was decided on September 27, 1919 that a plebiscite was to be taken in the Spisz area,[72] but at the Spa Conference in July, 1920, this arrangement was suspended. On July 28, 1920, a frontier line dividing the district between Poland and Czecho-Slovakia was decided upon by the Conference of Ambassadors, subject to such modifications as might later be made on the recommendation of the delimitation commission, and was accepted by Poland and Czecho-Slovakia. This decision was held by the court to have had a "final character." It was the result of what the court compared to an "arbitration." The agreements of Poland and Czecho-Slovakia of July 10, 1920, and July 28, 1920, were held to have given the decision of the Conference of Ambassadors, "over and above the authority possessed by a decision of the Principal Allied and Associated Powers", the "force of a contractual obligation entered into by the parties." The court then proceeded to construe the effect of the decision, denying the Polish contention as to its partial character. A question arose as to the effect of interpretations put on the decision by the Conference of Ambassadors, itself, some two years after the date of its formulation. The court likened the conference to an arbitrator in this respect, and refused to admit a modification of the clear effect of the decision by the later interpretation. Only the delimitation commission had been given power to vary the decision, and this power was still preserved to it. The undertaking of Poland and Czecho-

[72] For the text of this decision, see 113 *British and Foreign State Papers* 804. For the decision of the Conference of Ambassadors of July 28, 1920, see *ibid.*, p. 860. For the court's opinion, see *Collection of Advisory Opinions*, No. 8.

Slovakia on November 6, 1921, to settle "the question of the commune of Jaworzina within a period of six months by means of a direct and friendly agreement between the two governments", had not reopened the whole question; nor had that result been effected by the decision of the Conference of Ambassadors of December 2, 1921, calling on the Polish and Czecho-Slovak Governments to reach a decision by January 15, 1922, and authorizing the delimitation commission to proceed to carry out the decision of July 28, 1920, if they failed to do so.

PROPOSED REFERENCES TO THE COURT

Various questions arose during the year with reference to which proposals were made for references to the court.

a) Lithuania's request. On February 3, 1923, the Council of the League of Nations, in the course of its consideration of the Vilna dispute between Lithuania and Poland, adopted a recommendation for apportioning between the two countries the administration of the neutral zone established in the Vilna territory by the Kovno protocol of February 29, 1920.[73] The recommendation was accepted by Poland, but not by Lithuania. The Lithuanian Government soon afterward requested that the Council seek the court's opinion with reference to two questions which had arisen relating to the interpretation of the Covenant. On March 8, 1923, these questions were formulated as follows:

> 1. Has the Council of the League of Nations the right, when a dispute is submitted to it under paragraph 1 of Article 15 of the Covenant, to address to the parties with regard to incidental questions which have not been specifically submitted to it, recommendations having the same force as the Council's reports referred to in paragraphs 4, 6, and 7 of the same article?
>
> 2. If the recommendations of a report by the Council of the League of Nations have been adopted in the circumstances contemplated in the 6th paragraph of Article 15 of the Covenant of the League of Nations and have been accepted by one of the parties, are such recommendations binding upon the other party if it does not accept them? And, secondly, if, within the period fixed by Article 12 of the Covenant, it goes to war with a party which accepts the report, is it liable to the penalties laid down in Article 16?

On April 21, 1923, the Council considered this request of Lithuania and decided, on the proposal of M. Hymans (Belgium), not to seek the court's opinion. The Lithuanian representative then asked that the request be put on the agenda of the next Assembly.[74] The item on the Fourth Assembly's agenda was as follows:

> 23. Request to the Assembly from the Lithuanian Government concerning:

[73] *League of Nations Official Journal*, March, 1923, p. 238. For Lithuania's request, see *ibid.*, p. 586.

[74] *Ibid.*, June, 1923, p. 670.

(a) The Council's resolution of January 13, 1923;
(b) Reference of certain questions to the Permanent Court of International Justice for an advisory opinion.

On September 27, 1923, the Assembly decided, "according to a desire expressed by the Lithuanian delegation, to refer" the question to the Fifth Assembly.[75]

b) Expropriation of Hungarian optants in Roumania. This question was brought before the Council of the League of Nations by Hungary on April 20, 1923, and after a careful study M. Adatci (Japan) proposed on April 23, that the two governments be invited by the Council to enter into an agreement (*compromis*), of which he proposed a draft, referring to the court the question whether such expropriation constituted a violation of Article 63 of the treaty of Trianon or Article 3 of the Roumanian minorities treaty, and if so what measures should be taken by Roumania to indemnify the Hungarian nationals affected.[76] The proposal was accepted by Hungary, but declined by Roumania on the ground that while certain legal questions were involved the matter was much broader and included the whole Roumanian program of agrarian reform.[77] M. Adatci then suggested that the Council ask the court for an advisory opinion. A question arose as to whether in taking such action the unanimous votes of all representatives on the Council, including representatives of the disputant states, would be required. The Council finally decided that in the absence of "prospect of agreement" the question should be adjourned and M. Adatci should use every effort to secure agreement between the parties. Conversations were conducted at Brussels on May 26 and 27, under the presidence of M. Adatci, and the minutes contained declarations by both sides which offered a *modus vivendi*.[78] But on June 12, the Hungarian Government declined to proceed on this basis, and requested M. Adatci to renew the proposals he had made to the Council for resort to the court. The matter came before the Council on July 5, 1923, when Count Apponyi (Hungary) asked for a reference to the court. M. Titulesco (Roumania) relied on the Brussels accord in declining to agree to this course. Various members of the Council asserted its power to request an advisory opinion without the concurrence of the Roumanian representative,[79] but concurred in the decision that under the special circumstances no request should be made.

[75] *League of Nations Official Journal, Spec. Supp. No. 11*, p. 29. The matter was studied by both the first and sixth committees.

[76] The text of the proposed draft was published in *League of Nations Official Journal*, June, 1923, p. 703.

[77] See the very striking declarations of M. Titulesco (Roumania) in *League of Nations Official Journal*, June, 1923, pp. 606, 608.

[78] See the account in *League of Nations Official Journal*, August, 1923, p. 1012.

[79] Particularly Lord Robert Cecil (Great Britain) and M. Branting (Sweden). *League of Nations Official Journal*, August, 1923, p. 905.

c) Italo-Greek conflict. The murder of the Italian members of the Greek-Albanian Boundary Delimitation Commission, on Greek soil on August 27, 1923, led to the Italian occupation of Corfu on August 30 and an appeal by Greece to the Council of the League of Nations on September 1. On September 6, M. Quinones de Leon (Spain) submitted to the Council a series of proposals drafted in collaboration with several of his colleagues. One of these proposals provided for "the submission to the Permanent Court of International Justice, for decision under the rules of summary procedure, of the question of the indemnity to be paid by Greece." While these proposals were not adopted by the Council, a record of them was transmitted to the Conference of Ambassadors at Paris, which on September 7 adopted the following decision:

> (7) The Greek Government will undertake to pay to the Italian Government, in respect of the murder of its delegates, an indemnity, of which the total amount will be determined by the Permanent Court of International Justice at The Hague, acting by summary procedure. The court will give judgment on consideration of the report of the commission specified in paragraph 6. This report will be transmitted by the Conference of Ambassadors, with its comments, to the court of justice.
>
> The Greek Government will deposit forthwith, as security, at the Swiss National Bank, a sum of 50,000,000 Italian lire, such deposit to be accompanied by the following instructions: "to be paid over, in whole or in part, to the Italian Government, upon the decision of the Permanent Court of International Justice at The Hague."

This decision was modified by a later decision of September 13, in which the conference reserved to itself the decision as to Greece's fulfilment of the conditions laid down for her, and in the event of their non-fulfilment the decision as to measures to be taken which might include "the payment to Italy of a sum of fifty million Italian lire, and in that case the conference will request the Permanent Court of International Justice at The Hague to restore to Greece the security deposited by her, and no further application will be made to The Hague, as stated in paragraph 7 of the note of September 8th, unless any special application is made to the court by Italy for charges entailed by the occupation."

On September 26, the Conference of Ambassadors decided as a consequence of the negligence of the Greek Government in pursuing the authors of the crime, to award the entire fifty million lire to Italy. The resolution requested the court to order the Swiss National Bank to pay that sum to Italy. The money was paid, but it seems that no question was ever placed before the court and that the court took no action whatever.

On September 26, 1923, Lord Robert Cecil (Great Britain) proposed to the Council of the League of Nations to submit to the Permanent Court of International Justice certain questions regarding the interpretation of the Covenant, which had arisen in connection with the discussion of the Corfu

incident.[80] On September 22, the Council had asked a committee of jurists to formulate the questions. M. Salandra (Italy) doubted the competence of the Permanent Court of International Justice, inasmuch as the questions had a political character as well as a legal character. The proposal was discussed at some length in various meetings of the Council, in the course of which it was thoroughly recognized that the court should not be asked for opinions with regard to general questions, or, as it was put, should not be asked to write essays rather than to deal with disputes. As M. Salandra stated it, the court is not "an academy of jurists, but a magistrature." The Council finally decided on September 28 to set up a special commission of jurists to give an opinion on the questions before it. Each member of the Council was to nominate a jurist to serve on the commission, and the Director of the Legal Section of the Secretariat was to collaborate with the persons thus nominated. This inquiry by the special commission of jurists was accepted by the Council in lieu of any reference to the Permanent Court of International Justice.

ADVISORY OPINIONS

Of the nine questions which have come before the court in its first two years, eight have been on requests by the Council of the League of Nations for advisory opinions. This feature of the court's jurisdiction is thus proving to have an importance perhaps greater than many persons had anticipated. Its effect on the position of the court and on the nature of its jurisprudence may very well be given special consideration.

First of all, some difference may arise as to the nature of this function exercised by the court. Judge Moore has said that it "obviously is not a judicial function",[81] though he found that the rules adopted by the court (Articles 71–74) "assimilate the process as far as possible to a judicial proceeding." This view seems to have been accepted by Secretary Hughes in an address before the American Society of International Law.[82] Mr. Hammarskjöld thinks that "the whole idea of advisory opinions to be given by the court is in itself a novelty."[83] The conception of advisory opinions has also led to popular misunderstanding in America.

It is to be noted that the giving of advisory opinions by a court or by judges of a court is by no means new in the Anglo-American legal system.[84]

[80] *Minutes of the Council, 26th session, P. V. 16*, p. 3.

[81] 22 *Columbia Law Review* 507. Cf. Professor James Bradley Thayer's statement that the giving of advisory opinions "is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority." 7 *Harvard Law Rev.* 153. And Judge Cardozo has more recently said that "the giving of such opinions is not the exercise of the judicial function." Matter of State Industrial Commission, (1918) 224 N. Y. 13, 16. See also 10 *Virginia Law Rev.* 152.

[82] *Proceedings*, 1923, p. 84.

[83] 36 *Harvard Law Review* 715.

[84] The fullest consideration of the subject is *Departmental Cooperation in State Governments*, by Albert R. Ellingwood (MacMillan: New York, 1918). See also Thayer, *Legal Essays*, 42. H. A. Dubuque, "The Duty of Judges as Constitutional Advisers," 24 *Amer. Law Rev.* 369 (1890).

In England, the judges at one time gave opinions to the king. As late as 1760, such an opinion was given respecting the court-martial proposed to be held on Lord George Sackville.[85] These have been spoken of as "extra-judicial."[86] The House of Lords may still request the judges to give opinions,[87] though it has not frequently done so in late years. Some opinions given by the judges have had great influence in the development of the law.[88]

Since 1780, the constitution of Massachusetts has provided for advisory opinions to be given by the justices of the Supreme Judicial Court, "upon important questions of law and upon solemn occasion", at the request of either branch of the legislature, or of the Governor and the Council.[89] Opinions are frequently given, under this provision.[90] They are the "opinions of the justices", and not of the court, though they are published in the Massachusetts reports of the opinions of the court. It is said that the justices do not sit as a court, but as individuals.[91] They act "without the benefit of argument", and it is not clear that briefs may be filed by interested persons. Hence *stare decisis* does not apply; and if a question upon which an opinion is given arises in later litigation, the earlier opinion is not to be relied on and the matter is to be reexamined "with the effort carefully to guard against any influence flowing from our previous consideration."[92] The opinion is to be regarded as "open to reconsideration and revision; yet it imports a view resting upon judicial consideration and examination of the subject."[93] In a recent instance, the court has rendered a decision counter to a previous opinion of the justices.[94] Of course a previous decision might be overruled, but this is something more. If the opinion were to be regarded as the opinion of the court, it would not be subject to *stare decisis*. It may nevertheless possess a judicial character.

In various other states, advisory opinions are given by the judges of the state supreme court. The constitution of New Hampshire has provided for

[85] See 2 *Eden* (*Appendix*) 371. The judges put in a *caveat*, however, that "we should be ready, without difficulty, to change our opinion, if we see cause, upon objections that may be then laid before us, though none have occurred to us at present which we think sufficient."

[86] (1878) 126 Mass. 561.

[87] At least there is a dictum to this effect in Attorney-General for Ontario *v.* Attorney-General for Canada [1912] A. C. 571, 586. Of course, a judgment of the Judicial Committee of the Privy Council is "a statement of the reasons which determine them in 'humbly advising' the King to give effect to their decision." Anson, *Law and Custom of the Constitution*, Vol. II, p. 293 (4th ed.).

[88] For instance, the opinions in M'Naghten's Case, (1843) 10 *Clark & Finnelly* 200.

[89] Constitution of Massachusetts, Chap. III, Art. II.

[90] Volume 237 of the Massachusetts reports contains five such opinions; Vol. 239, two; and Vol. 240, three.

[91] Rugg, C. J., in Loring *v.* Young, (1921) 239 Mass. 349, 361, 132 N. E. 65, 68.

[92] Young *v.* Duncan, (1914) 218 Mass. 346, 351, 106 N. E. 1, 4.

[93] Rugg, C. J., in Loring *v.* Young, (1921) 239 Mass. 349, 361, 132 N. E. 65, 68. See also Perkins *v.* Westwood, (1917) 226 Mass. 268, 272, 115 N. E. 411.

[94] Loring *v.* Young, (1921) 239 Mass. 349, 132 N. E. 65.

such opinions since 1784,[95] the constitution of Maine since 1820,[96] and the constitution of Rhode Island since 1842.[97] The Missouri constitution of 1865 contained a similar provision,[98] but it was not retained in the constitution of 1875. In Florida, the Governor has been authorized to require the opinion of the justices on certain questions since 1868,[99] and in South Dakota since 1884.[100] The constitution of Colorado, since 1886, has imposed the duty to give advisory opinions on the court itself, not simply on the judges; so that the Colorado court has declared that its responses "have all the force and effect of judicial precedents."[101] For this reason, doubtless, it has narrowly confined the field within which the competence will be exercised.[102]

A statute in Delaware, dating from 1852, puts on the chancellor and judges a duty to give opinions to the Governor on certain questions, though few opinions seem to have been requested.[103] In Alabama, the legislature itself has recently provided that the Governor or either house of the legislature may obtain the opinion of the justices of the Supreme Court on constitutional questions. The statute provides however that the opinions are not to be binding, even on the justices giving the opinions, though it authorizes the justices to request briefs from the Attorney-General and to receive briefs from "other attorneys as *amicus curiae*."[104] The validity of this act has recently been "affirmed" by five of the seven justices.[105]

In Oklahoma, in a criminal case where sentence of death has been imposed and where no appeal is taken, the judges of the Criminal Court of Appeals are empowered by statute to give an opinion to the Governor.[106] "The questions presented are: Has there been an observance of all the formalities of law essential to the taking of human life, or has the trial, conviction and sentence of death been in accordance with the law of the land?"

A number of Canadian courts possess jurisdiction to give advisory opinions, and the Judicial Committee of the Privy Council has decided that a statute authorizing the Governor General in Council to request opinions of

[95] A recent opinion may be found in (1919) 79 N. H. 535, 112 Atl. 525.

[96] A recent opinion may be found in (1921) 120 Maine 566.

[97] A recent opinion may be found in (1922) 44 R. I. 275.

[98] See *Missouri General Statutes of 1866*, p. 36.

[99] See (1919) 78 Florida 156, 82 Southern 606.

[100] See *In re* Rural Credits Law, (1917) 38 So. Dak. 635, 162 N. W. 536; In re Opinion of the Judges, (1920) 43 So. Dak. 645, 180 N. W. 64.

[101] (1889) 12 Colo. 469. But see Ellingwood, *op. cit.*, p. 189.

[102] For the limits in general, see Ellingwood, *op. cit.*, c. 3.

[103] According to Ellingwood, p. 69. An opinion was recently given In re School Code of 1919, (1919) 30 Del. 406, 108 Atlantic 39. In this instance, the chancellor and judges received briefs and heard arguments of counsel.

[104] The Act was approved on February 13, 1923. See 10 *Virginia Law Rev.* 150.

[105] In re Opinions of the Justices, (1923) 96 So. 487. See, however, Re Application of the Senate, (1865) 10 Minn. 78.

[106] Bunn, *Compiled Statutes of 1921*, §2786. See In re Blakely, (1921) 195 Pac. 146; In re Ledbetter, (1921) 195 Pac. 149.

the Supreme Court of Canada was not repugnant to the British North America Act.[107] Lord Loreburn repudiated a suggestion that the giving of advisory opinions could deserve to be "stigmatized as subversive of the judicial function."

Is a court exercising a judicial function when the judges, acting not as individuals but as a court, give advisory opinions? What are the essential attributes of *judiciality?* It can hardly be necessary that an actual contest between public or private litigants be before the court. The importance of such a contest would seem to be the narrowing of issues and the threshing out of the questions they involve. But both of these ends may be achieved in other ways.

In passing upon the constitutionality of a statute, American courts frequently act under circumstances which render the actual contest between litigants of little significance. Thus in New Jersey a special procedure was invented for determining whether a statute had been duly enacted, and the Supreme Court held that though there was no litigation *inter partes*, there was a judicial question for which the legislature could create a special method of judicial procedure.[108] The appeal allowed the State in criminal cases in some jurisdictions is in essence the same kind of proceeding; it has as its object the eliciting of "an authoritative exposition of the law upon disputed questions."[109] It would hardly be denied that this is a *judicial* proceeding.

If a legal question arises in connection with some actual problem, upon the solution of which immediate action depends, if it is put to a court by a competent authority, if it is carefully argued before the court by representatives of interests which might be affected by the answer, and if the court proceeds to deliberate upon it in a serious way and gives to the results of its deliberation the same solemn notoriety which it gives to its decisions in formal litigations *inter partes*, then the giving of such an opinion may surely be said to have the requisites of a judicial proceeding.

The advisory opinions which the Permanent Court of International Justice has given have all been *judicial* opinions in this sense. Each of them has related, first of all, to some legal question of defined limits. The Council has not sought advice in general. It has referred to the court specific questions, all of which have involved the interpretation of treaties. Moreover, all of these questions have related to problems which have arisen in practical affairs. The first three related to the functioning of the International Labor Office.[110] The fourth related to a pending dispute between

[107] Attorney-General for Ontario *v.* Attorney-General for Canada, [1912] A. C. 571. It is to be noted that Lord Finlay, then Sir Robert Finlay, K. C., now a judge of the Permanent Court of International Justice, was of counsel attacking the statute.

[108] In re Public Utility Board, (1912) 83 N. J. L. 303, 307.

[109] State *v.* Mackey, (1891) 82 Iowa 393; State *v.* Gilbert, (1908) 138 Iowa 335.

[110] It may be thought that the third question did not relate to any pending problem, however, for the Director of the International Labor Office stated that "the International

Great Britain and France; the fifth to a dispute between Finland and Russia; the sixth to the expropriation of German colonists actually begun; the seventh to the construction to be placed on a treaty in a situation demanding action under it; and the eighth to a pending boundary dispute between Poland and Czecho-Slovakia.

In every case, the submission has been effected by a legally competent body in a legally proper way.[111] In every case, briefs have been submitted. In every case, the court has heard arguments from duly accredited agents or representatives of interests involved. Five such representatives appeared before the court in connection with its deliberation on the first opinion requested; seven, on the second; two, on the third; two, on the fourth; two, on the fifth; two, on the sixth; and two, on the seventh. Under the rules of court (Article 72), the court requires an exact statement of the question, and (Article 73) notice of the request for the opinion is given not only to all members of the League and other states mentioned in the Annex to the Covenant, but also to "any international organizations which are likely to be able to furnish information on the question." The object of this is quite clearly to enable interested states or organizations to apply to be heard in argument before the court.

The announcement of each opinion takes place at a public session of the court, where the opinion is read aloud. A copy is then sent to the Secretary General of the League, who communicates the text to all members of the League and to all states mentioned in the Annex to the Covenant. The opinion is at once published, also, and copies are placed on sale to any individual.

Under these circumstances, it would seem clear that the court is performing a judicial function when it gives advisory opinions to the Council of a League of fifty-four nations. The question has achieved added importance because of recent proposals for depriving the court of this jurisdiction.[112] As to the court's own attitude toward this function there can be no doubt since its refusal to give an opinion on the East Carelian question and its statement that "the court, being a court of justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a court."

Labor Organization has never considered any intervention" with reference to agricultural production. But a limited intervention in that direction had been proposed by M. Zumeta (Venezuela) at the Third International Labor Conference, so that the problem had immediate importance. See *League of Nations Official Journal*, August, 1922, p. 897. Moreover, the court was thoroughly alive to the necessity of confining its opinion to a definite question relating to a specific problem. See the opinion in Series B, No. 4, p. 59.

[111] This is the significance of the court's reception of the letter of the Secretary-General of the League, of October 4, 1922, relating to the Tunis-Morocco question.

[112] See President Harding's address of June 21, 1923, in this JOURNAL, Vol. 17 (1923), pp. 533, 536.

LANGUAGES BEFORE THE COURT

It is provided in the court's statute (Article 39) that "the official languages of the court shall be French and English." If the parties agree that the case shall be conducted in French or in English, the judgment will be delivered in the same language; and in the absence of such agreement, the decision is to be given in both languages, the court determining which is to be authoritative. The court may also authorize the use of another language, at the request of the parties.[113] All of the proceedings before the court to date have been conducted in French or in English, except the statements made by M. Schiffer in the *Wimbledon* case and in connection with the two questions as to minorities in Poland, which were in German. All of the eight advisory opinions, and the judgment in the *Wimbledon* case, have been given in French and English. In five cases the court has designated the French text as authoritative, and in four cases the English text.[114]

On March 29, 1923, the British Government drew attention in a memorandum to the "desirability of candidates for election to the Permanent Court of International Justice having a working knowledge of both French and English."[115] This was considered by the Council on April 17, 1923, when M. Adatci (Japan) proposed a resolution on the subject, and the Council decided to circulate the British memorandum.[116] Later, the Spanish Government drew attention to the position it had consistently maintained in favor of the employment "of languages other than French and English," and stated that "it considers that a working knowledge of English and of French should not be considered as an essential qualification for election to the Permanent Court of International Justice, but that in choosing the judges, the main consideration should be their legal knowledge and high moral character, and that they should be allowed perfect freedom to acquire their knowledge when and in whatever manner they choose."[117]

PUBLICATIONS OF THE COURT

The court has inaugurated a very excellent scheme for issuing its publications.[118] Four series have been established. Series A will be a collection of judgments; number 1 of this series gives the judgment in the *Wimbledon* case. Series B will be a collection of advisory opinions, of which eight have now been published. In Series C, the acts and documents relating to the judgments and advisory opinions given by the court will be published: num-

[113] See also Article 44 of the rules of court.

[114] Yet Mr. Gregory stated in this JOURNAL, Vol. 17 (1923), p. 305, that "the closing announcement as to the English and French versions 'the French text being authoritative' sounds again for us the exotic note."

[115] *League of Nations Official Journal*, June, 1923, p. 629.

[116] *Ibid.*, p. 555.

[117] *Document C. 479. M. 198. 1923. V.*

[118] See this JOURNAL, Vol. 17 (1923), p. 836.

ber 1 contains the documents relating to the first three advisory opinions and number 2 contains the documents relating to the fourth advisory opinion. In Series D, acts and documents concerning the organization of the court will be published; number 2, the first to appear, deals with the preparation of the rules of court and contains the minutes of meetings held during the preliminary session of the court, from January 30 to March 24, 1922; number 3 contains extracts from international agreements affecting the jurisdiction of the court.

The protocol of signature, statute and rules of court have not been issued in the official publications of the court, though a convenient volume containing all of them was put out in 1922 by the *Institut Intermediaire International.*[119] Nor do the publications include, as yet, the cases and counter cases and other documents filed by parties to contested cases or by governments or organizations interested in questions submitted for advisory opinions. On January 24, 1923, the Registrar addressed a letter to the Secretary-General who circulated it to all members of the League, in which the court "expressed the wish that, *a*) governments filing printed documents of procedure should place at the disposal of the court, beyond the number of copies required for the purposes of the procedure, a further number of copies printed on inexpensive paper which, with the consent of the interested governments, could be distributed to scientists and scientific organizations, together with the court's own publications; *b*) that for printed documents of procedure filed by governments with the Permanent Court of International Justice a shape and size should be adopted similar to that used by the court for Series A and B of its publications."[120]

BUDGET OF THE COURT

The budget of the court forms a separate part of the budget of the League of Nations. The budget of the League for 1922 provided 1,500,000 gold francs for the expenses of the court. As from February 20, 1922, the President and Registrar of the court assumed control of its funds, and the expenses for 1922 were met by the "permanent imprest system." On February 16, 1922, the President suggested an arrangement for 1923,[121] which was considered by the Council on May 11, 1922.[122] On July 17, 1922, the Council resolved to propose to the Assembly that the expenses of the court be incorporated in the general budget of the League, and that "from each contribution paid by the members of the League of Nations into the general funds, the court shall be granted a share corresponding to the proportion which its own budget bears to that of the League of Nations, it being understood that,

[119] But see Mr. Hammarskjöld's statement in 36 *Harvard Law Review* 725, which would indicate that this publication should be considered as number 1 of Series D.

[120] *Document C. 159. M. 83. 1923. V.*

[121] See *League of Nations Official Journal*, June, 1922, p. 565.

[122] *Ibid.*, pp. 520, 564.

when necessary, the court may also be granted, in the same proportion, advances from the working capital fund."[123]

The Third Assembly approved a set of regulations for the financial administration of the League of Nations,[124] defining the financial autonomy of the court, with the result according to Mr. Hammarskjöld, that "the budget as approved by the court need not pass through the Council but will pass direct to the Assembly for approval."[125]

In determining the budget for 1924, the Registrar submitted estimates, doubtless with the approval of the court or its President, to the supervisory commission of the League. The latter recommended certain reductions. Thereupon, on June 23, 1923, the court adopted a resolution, expressing the "opinion that certain of the reductions recommended by the commission in the estimates submitted by the Registrar appear to be excessive from the standpoint of the efficient working of the court's services." But "having regard to the necessity of endeavoring to effect economies in every direction under the conditions at present prevailing throughout the world," the court adopted the budget estimates as passed by the commission, "on the understanding that the court reserves the right, if necessary, to ask the Fourth Assembly for supplementary credits."

The budget of the court for 1922 was 900,000 florins, of which 709,914.27 florins were expended; for 1923, 935,625.70 florins. For 1924, 921,739.83 florins have been allowed.[126]

PENSIONS FOR THE JUDGES

The statute of the court provides (Article 32) that:

> The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the court.

On January 13, 1922, the Council directed the Secretary-General to "inform the Council concerning the measures to be taken to regulate the question."[127] The Secretary-General conducted an investigation of the system of pensioning national judges in various countries, as well as the judges of the Egyptian Mixed Tribunals, and reported to the Council on July 4, 1923.[128]

On July 7 the Council requested the supervisory commission to report a proposal which might be laid before the Assembly. The supervisory com-

[123] *League of Nations Official Journal*, August, 1922, pp. 787, 829.

[124] *Records of Third Assembly, Plenary Meetings*, Vol. II, p. 207. As amended by Fourth Assembly, *Document C. 663. M. 266. 1923. X.*

[125] 36 *Harvard Law Review* 724.

[126] See *Document C. 668. M. 268. 1923. X.*

[127] *League of Nations Official Journal*, February, 1922, p. 102.

[128] *Ibid.*, August, 1922, pp. 881, 936, 989.

mission at its seventh session decided to entrust a further investigation of the question to Lord Meston (India) and Dr. Neberbragt (Netherlands).[129] Meanwhile an item on contribution to the pension fund is carried in the budget for 1924.[130]

ELECTION OF JUDGE PESSOA

The death of Judge Ruy Barbosa on March 1, 1923, created a vacancy in the personnel of the court. Judge Barbosa had been prevented by illness from attending any meeting of the court, and had not actively participated in its work.[131] On April 17, 1923, the Council decided that the election of his successor should be included in the agenda of the Fourth Assembly and of a meeting of the Council to be held during the session of the Assembly.[132] The national groups in the Permanent Court of Arbitration, belonging to members of the League or to other states mentioned in the Annex to the Covenant, were invited by the Secretary-General to make nominations, as were also additional national groups of members of the League not represented in the Permanent Court of Arbitration.[133]

Thirty-one nominees were thus named on the list placed before the Assembly and Council.[134] Thirty-eight national groups participated in the nominations, and twenty-two of them nominated M. Epitacio da Silva Pessoa, ex-President of Brazil, ex-Delegate to the Peace Conference, and ex-Judge of the Federal Tribunal. The voting took place in the Assembly and Council on September 10, 1923, and on the first ballot M. Pessoa received a majority of the votes cast in both bodies.

A notable feature of this election was the nomination made by the group representing the United States in the Permanent Court of Arbitration, Messrs. George Gray, John Bassett Moore, Elihu Root and Oscar Straus. An unfortunate incident had delayed the invitation which had been sent to this group to make nominations in connection with the original election of the judges in 1921. The invitation was despatched from Geneva on June 4, 1921, being sent to the Secretary of State for transmission to the American members. But it had not been received by the latter on August 12, when a fresh invitation was sent from Geneva. The time was then very short. On September 16, 1921, the Secretary General notified the Assembly and the Council of the receipt of the following telegram from the members of the American group:

[129] *Document A. 43. 1923. X.*

[130] *Document A. 4 (b) (2). 1923. X.*

[131] This and the fact that Deputy-Judge Wang first sat with the court on June 15, 1923 are the only foundation for a very surprising statement by Mr. Gregory in this JOURNAL, Vol. 17 (1923), p. 306, that "some of these judges after a lapse of a year have not yet appeared or functioned with the court, yet it is understood have faithfully drawn their stipends."

[132] *League of Nations Official Journal*, June, 1923, p. 554.

[133] In accordance with Article 4, paragraph 2, of the court's statute.

[134] Two nominees, MM. Alvarez (Chile) and Politis (Greece), declined the candidacy.

> Considering that our appointment by the President as members of the Permanent Court of Arbitration was, under the Hague Convention of 1907, to perform the functions contemplated in that convention and that your invitation to nominate candidates for judges of the new Permanent Court of International Justice is under another treaty to which the United States is not a party, and in respect of which no authority has been conferred upon us, we reluctantly reached the conclusion that we were not entitled to make official nominations for the new court. We exceedingly regret that the announcement of this conclusion has been unavoidably delayed.[135]

But this position was reversed in 1923, when the American group nominated M. Pessoa, acting under the same treaty on which they had previously based their incompetence.

CHAMBER FOR SUMMARY PROCEDURE

The Chamber for Summary Procedure is formed annually, according to the statute (Article 29), and the tenure begins on January 1, according to the rules of court (Article 14). For 1922, the members were Judges Loder, Weiss and Huber, with Lord Finlay and Judge Anzilotti as substitutes; for 1923, the members were Judges Loder, Weiss and Moore, with Lord Finlay and Judge Altamira as substitutes. On September 15, the Registrar announced that the chamber for 1924 would consist of Judges Loder, Weiss and Huber, with Lord Finlay and Judge Altamira as substitutes.[136]

RECEPTION OF THE COURT

The support of the court is being extended continually. On May 15, 1923, forty-six states or members of the League had signed the protocol of signature.[137] On August 1, 1923, the protocol was signed by a forty-seventh state, Hungary.[138] Thirty-five states or members of the League had ratified the protocol of signature on May 15, 1923, and a thirty-sixth, Latvia, has since ratified. On that date, also, twenty states had accepted the optional clause providing for compulsory jurisdiction, but it has since been accepted by a twenty-first state, Latvia.[139]

In addition to this formal action on the constitutive instruments of the

[135] See *Document A. 92. 1921 V.*

In an address before the American Society of International Law, on April 26, 1923, Mr. Root stated that "the members of the American group, however, other than Mr. Moore, did not hesitate to express their unanimous personal opinion that the wisest possible choice among the citizens of the United States for membership in the court would be Mr. Moore himself." How this opinion was expressed, and to whom, is not disclosed by any documents available to the writer.

[136] *Document C. 623. M. 234. 1923. V.*

[137] See publications of the court, Series D, No. 3, pp. 12 ff. See, also, the *League of Nations Treaty Series*, Vol. VI, p. 379; Vol. XI, p. 404.

[138] See *Document A 10 (a). Annex 1923*, entitled *Progress of International Conventions and Engagements.*

[139] *Document C. 624. M. 235. 1923. V.*

court itself, the prestige of the court is being increased continually by accretions to its jurisdiction by reason of references in various treaties and conventions. The volume recently published by the court [140] indicates the extent of such references up until May 15, 1923. Since that date, numerous international treaties and engagements have mentioned the court. Among these are the Latvian minorities declaration to the Council of the League on July 27, 1923,[141] the resolution of the Council of the League of Nations relating to the protection of minorities in Esthonia, of September 17, 1923;[142] the convention for the suppression of the circulation of and traffic in obscene publications, September 12, 1923;[143] and the convention relating to the simplification of customs formalities, of November 3, 1923.[144]

The professional comment on the establishment of the court and on its work, continues to be almost uniformly favorable.[145]

THE UNITED STATES AND THE COURT

Aside from the individual participation of Mr. Root and Dr. Scott in the work of the Committee of Jurists which framed the statute of the court, the United States had no part in establishing it. On July 13, 1922, Secretary Hughes stated that he saw "no prospect for any treaty or convention by which we should share in the maintenance of the court until some provision is made by which, without membership in the League, this Government would be able to have an appropriate voice in the election of the judges." [146] On October 30, 1922, he expressed his belief "that suitable arrangements can be made for the participation by this Government in the election of judges of the international court which has been set up, so that this Government may give its formal support to this court as an independent tribunal of international justice." [147]

On February 17, 1923, Secretary Hughes addressed a letter to the President, recommending that the Senate be asked for its advice and consent to the adhesion on the part of the United States to the protocol of December 16,

[140] Series D, No. 3, entitled *Extracts from International Agreements affecting the Jurisdiction of the Court.* See also, the writer's article in this JOURNAL, Vol. 17 (1923), p. 24, and Professor Blociszewski's article in the *Revue Generale de Droit International Public, 1922*, p. 23.

[141] *League of Nations Official Journal*, August, 1923, p. 933.

[142] *Minutes of Council, 26th session, P. V. 13*, p. 21.

[143] *Document C. 630. M. 236. 1923. IV.*

[144] *Document C. D. I. 96 (1) 1923.*

[145] See 1 *Cambridge Law Journal* 29; Ernest Lemonon, in 49 *Journal du Droit International (Clunet)* 761; 1 *Boston University Law Review* 6; Gabrielle Salvioli in *Rivista di Diritto Internazionale*, April, 1923, p. 11; 9 *American Bar Assn. Journal*, 160; W. L. Frierson in *Maryland State Bar Assn. Report for 1922*, p. 74; Charles H. Carey, in 2 *Oregon Law Review* 205. See also Judge de Bustamante's interesting paper in 4 *Revista de Derecho Internacional* 5. For a partial bibliography, see the *Advocate of Peace*, Dec., 1923, p. 438.

[146] New York *Times*, July 15, 1922, p. 1.

[147] *Ibid.*, October 31, 1922, p. 4.

1920, on four conditions and understandings.[148] President Harding acted in accordance with this recommendation on February 24, 1923, transmitting a copy of Secretary Hughes' letter. The Senate referred the matter to the Committee on Foreign Relations, which requested further information. On March 2, 1923, the President furnished such information, transmitting Secretary Hughes' letter of March 1.[149] No definitive action was taken by the Senate before its adjournment on March 4, however. In an address at St. Louis, on June 21, 1923,[150] President Harding seems to have modified his own views in some degree. In his message of December 6, 1923, President Coolidge commended President Harding's February proposal "to the favorable consideration of the Senate."

During the later months of 1923, the United States has renewed arbitration treaties with Great Britain (June 23), France (July 19), Japan (August 23), Portugal (September 5), and Norway (November 26). "At the time of the signing of the agreement [in each case] notes were exchanged to the effect that in case the Senate shall give its assent to the President's proposal for the participation by the United States in the support of the Permanent Court of International Justice, the two governments will consider the making of an agreement under which the disputes, of the nature described in the treaty, could be referred to the Permanent Court of International Justice."[151]

In his letter of February 17, 1923, Secretary Hughes proposed certain "conditions and understandings" on which the American adhesion should be based, and he stated that "the attitude of this Government will thus be defined and communicated to the other signatory Powers whose acquiescence in the stated conditions will be necessary." It was clearly Mr. Hughes' view that such acquiescence would be a sufficient acceptance of the American conditions and understandings, and that no amendment of the formal documents creating the court would be necessary. The juridical basis for this view had been previously outlined by the writer,[152] and the view seems to have been generally accepted in the United States.

But Mr. Hughes' proposal does not seem to have been understood by some writers in other countries. Professor Eugène Borel has recently published an article in which he states that what is required is a "revision of the Covenant aiming to permit the Assembly and the Council to associate with themselves, by a concurrent vote and for a special and expressly determined question, the delegation of a state which, without forming a part of the League, would nevertheless be invited by this vote to act as a collaborator

[148] Senate Document No. 309, 67th Congress, 4th session. 64 *Cong. Record*, 4508. Reprinted in this JOURNAL, Vol. 17 (1923), p. 332.

[149] Senate Document No. 342, 67th Congress, 4th session. Reprinted in this JOURNAL, Vol. 17 (1923), p. 339.

[150] Reprinted in this JOURNAL, Vol. 17 (1923), p. 533. Cf. comment by Mr. George A. Finch, *ibid.*, p. 521.

[151] *Communiqués* issued by the Department of State. See also, *U. S. Treaty Series*, No. 674.

[152] In an article in *Foreign Affairs*, December 15, 1922, pp. 80–81.

in the matter in question."[153] But he does not appear to have taken account in any way of Mr. Hughes' suggestion as to "acquiescence."

A more recent and better-considered comment on the method by which American adhesion might be effected is that of Dr. Hans Wehberg,[154] who finds that while Mr. Hughes' first, third and fourth conditions involve no modification of the court statute, his second condition as to the election of judges involves the kind of change which ought not to be made in a treaty without formal revision. Dr. Wehberg therefore suggests that the Assembly of the League undertake a revision of the court statute. But he has not analyzed the arguments for the sufficiency of the acquiescence alone, and those arguments seem quite irrefutable. Certainly it is desirable, if possible, to avoid the cumbersome process of amending the statute of the court, which would doubtless require affirmative action by each of the signatories to the protocol.

CONCLUSION

The Permanent Court of International Justice has made a promising start on its career. In two years, it has handed down nine opinions, all relating to difficult problems which involved vexed questions of international law and threatened to disturb international understanding. In each case, the court's opinion has met with general satisfaction. In each case the states concerned have at once set about to act upon the court's pronouncement of the law. On the administrative side, the court has made steady progress toward increasing its efficiency and smoothing out its difficulties. The influence of the court has been steadily growing. With forty-seven signatories to the protocol under which it exists, with lawyers everywhere viewing its record with satisfaction and hope, the court promises a fulfilment of the world's long-cherished desire.

The American delegation to the Hague Peace Conference of 1907 reported, "A little time, a little patience, and the great work is accomplished." The prophecy approaches fulfilment.

[153] This JOURNAL, Vol. 17 (1923), pp. 429, 436.

[154] "*L'Amérique et la Cour Permanente de Justice Internationale*," 4 *Revue de Droit International et de Législation Comparée*, 3 series, p. 179.

THE CODIFICATION OF INTERNATIONAL LAW

SOME PRELIMINARY QUERIES

By Henry G. Crocker

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The task of codifying international law is so vast, the subject thus named so uncertain in nature and in limits, language so imperfect and misleading, and human reason so puny, that a person who addresses himself to the business with the intention of elaborating concrete expressions of the law finds himself with no solid foothold to start from, no certain direction to take, and no clear conviction as to how best to work. In the present attempt to study the problem of codification of international law in a few of its aspects, the writer has taken one topic only, the treaty, thinking that here we have phenomena in plenty and that discussion thereof may be a fruitful preliminary procedure. For even here, at the very outset, we are confronted with primary questions which throw us back to the very threshold as it were of the whole subject.

A treaty is an agreement between state How about the converse? Can we say that every agreement between states is a treaty? An agreement may be oral. May a treaty be oral? We daily see states as well as individuals regulating their conduct to discharge obligations which they consider only moral and which have their sources in agreements of very informal nature, which they sometimes call understandings.

Where is the line to be drawn between international law on the one side, and other systems or parts of systems which import duties and which exist outside of international law though perhaps supporting it, such as international morality, ethics, etiquette? That international law has a powerful sanction in public opinion has been clearly shown, but it is also true that international morality and even international etiquette have the sanction of public opinion to promote their observance. Sometimes public opinion is stronger in support of some point of international etiquette than it is in a matter of international law, quite as it acts in relations between individuals. The fact that this sanction exists is therefore not a test of the nature of an obligation as regards its quality as a legal obligation. What is a true test? Sanction of legalized community force, we may agree, is a practical test of national law, but legalized community state force does not exist, and so we have not this practical test for international law. It has been argued that because of the lack of this community state force inter-

national law is not law. But must a test be an ingredient of the thing tested? At any rate, if international law be not law, it is something that goes by the name of international law, though it may be international x, a something which all agree exists. How it is to be given practical effect in the conduct of unwilling states is a question of expediency, a starting-point for more law, which does not affect the nature of what international law already exists. The world is clamoring for a lucid statement of existing international law, and the march of progress is demanding additions thereto. A code is considered a good vehicle for lucid expression, and so a code is demanded. Now, in order to frame even a part of a code of international law, it seems from what has been said necessary first to determine the limits of the code with at least sufficient definiteness for practical progress. And to determine the limits of the code implies in substance determining the limits of international law and perhaps something else in form.

To "codify international law." What does this mean? Clearly it does not mean to codify the science of international law, for the science of international law is of greater content than international law. What, then, is embraced in the science of international law that is not embraced in international law? The works of jurists contain not only statements of international law but also expositions of the foundations of that law. If we are to codify international law, not the science of international law, we need to know where the foundations end and the law structure begins. Many of the so-called principles and rules of international law may reside only in the science.

One boundary, which it is necessary to draw, will exclude facts of existence and processes of reasoning and the moral law, in which we may for our purposes conveniently group all "oughts" that are not legal ones, so far as they are merely foundations of international law but not included within its body. One may be morally bound to certain conduct regardless of the law; he may be also legally bound to the same conduct. His act then has a two-fold aspect, but the moral obligation is distinct from the legal obligation. There will be a superadded moral obligation springing from the fact that the act is prescribed by law. Again, that two plus two make four is not international law obviously, and nobody would assert it to be so; but there are numerous mere dictates of reason that, because they are applied to the matter of international law, are often thought to be international law. Take the following statement regarding interpretation of treaties: "Ordinary words must be taken in an ordinary sense and technical words in a technical sense." This statement properly finds place in a work on the *science* of international law, for the science deals not only with international law itself but also with its foundations, its method and its purposes. But is it not merely a dictate of reason? If, however, this illustration be inaptly chosen, there must be, from the very fact that international law is not identical in scope with the *science* of international law, many dictates of reason, or

demands of equity, or morality, that lie outside the former and within the latter. We are not seeking to formulate a systematic exposition of the science of international law, but a statement of the rules of international law, *i.e.*, rules which are international law.

A second line, which it may be advisable to draw, would exclude those conclusions which follow the provisions of the code directly as corollaries. If obvious deductions from code provisions are not excluded, the code will become a digest. For example, to say that ratification of a treaty by a nation is necessary to render it binding where such ratification is expressly made a condition in the treaty, so obviously follows from the rule that mutual consent is necessary to give rise to an obligation, that its inclusion would seem to be superfluous. Obvious deductions from general rules applied to special sets of facts are numberless. On the other hand, code rules or principles in combination applied to a set of facts and circumstances will by a process of reasoning often result in another rule of international law which should be included in the code for the reason that it is not an *obvious* deduction. What is an obvious deduction?

Besides the questions of content, there are questions of form that must be resolved at the outset to avoid confusion. So far as possible, words should be definite in meaning. Ambiguity should not be tolerated. Constructions should be simple and direct. A few remarks on special points of expression follow. The difficulties of form alone are of great magnitude.

The words ordinarily used to express legal relations are right, duty, obligation, power, privilege, disability, immunity, capacity. Of these, some are correlatives of others, some are opposites of others. The words duty and obligation are synonymous, both being used in law and ethics. It may be desirable to confine one to the domain of law, and the other to the domain of ethics, but that is not present usage. It seems clear that in a code it is best to use the same word for the same idea throughout, and without expressing any preference between "duty" and "obligation", I am using the latter only. In our draft articles an obligation means always an international legal obligation, an obligation of international law. Obligation is correlative of right. Which of these should, in general, be the central idea of a code article? Does it not seem that the word obligation should be selected as the simpler? Just as municipal law is primitively a command to individuals to do or not to do a certain thing, not because some other individual has a *legal* right, but in the general interest, wherefrom the other individual derives a right as a consequence of the obligation, so international law imposes an obligation upon a state in the general interest and therefrom results the correlative right. The legal right may be co-equal with the legal obligation in duration, but it is a consequence.

The articles, too, of a code should be in the simplest form. We find in text-books such statements as this, "Treaty rights and obligations in contravention of international law are void." The imperfections of language are

manifest in this statement. The subject of the sentence, "Treaty rights and obligations" assumes their existence, and the predicate asserts their non-existence, unless the word "void" can mean that although they exist, they have no legal effect. But that meaning is inconsistent with the meaning of obligation. What are the essential facts here assumed? First, a state, secondly, its attempt to assume an obligation in contravention of international law, thirdly, the means it employs, a treaty. Is it not the second of these that is abortive in international law? Suppose the state makes a like attempt by other means than treaty; would not the same lack of legal effect attach to that attempt? Suppose we say then, "A state has no power (or is not competent) to assume an obligation in contravention of international law." Is not this more general statement recognized as true? It does not mention means, and so includes all means. If we enlarge it to read, "A state is not competent to assume an obligation in contravention of international law by means of treaty" we have a corollary. A question for the codifier, when drafting a section concerning treaties, is whether this corollary should be included here and the general proposition elsewhere in the code, or the general proposition put here, or the general proposition put elsewhere and the corollary omitted altogether.

Among grammatical constructions to be used with great care is the passive voice, which is frequently met with and is the cause of confusion through complexity of thought. The passive voice assumes the existence of an active voice and the existence of an actor. A passive construction which seems sufficiently clear in meaning is often perceived to be vague when attempting to resolve it into its component ideas by means of an active construction. An intransitive verb is sometimes a veiled passive.

Finally, the code should be symmetrical, and it is therefore advisable to reach decisions on a section of it with respect both to content and form before drafting the whole.

Several writers and jurists have proposed codes of international law and others have written text-books in code form on the science of international law, with numbered articles followed by comment. The codes vary in substance from expressions of existing law as the author understands it to expressions of what ought to be the law in the author's opinion; and in form from the succinct to the diffuse or, it may be fairer to say, detailed. A comparison of these discloses that many different views are held on questions of substance; that what one includes another excludes, and that even when the substance of a rule is unanimously accepted the statements vary in the phrasing. Scrutiny and comparison of these articles are highly instructive, and we have taken a few, almost at random, to see what practical suggestions they offer a codifier. It was of course far from the minds of most of these writers that their proposals should be transplanted *expressis verbis* into an official code, and it should also be kept in mind that some of these translations may only approximate the meaning of the original.

Duplessix, in his draft code of public international law, has proposed the following articles under the caption "Conclusion and form of treaties":[1]

> 369. Negotiation of treaties may be conducted by the competent territorial authority or by delegates to which it transmits all or part of its powers.
>
> 370. This negotiation may be preceded by conferences resulting in simple preparatory study without involving the parties in any engagement.
>
> 371. Treaties should contain: indication of the contracting states; declaration of the object of the treaty; enumeration of the names and positions of the negotiators and statement of their powers; the clauses of the convention; the reservations that may be advisable; especially as regards ratification; place and date of signature; the number of copies drawn up; signature and seal of the negotiators. At least one copy of the treaty should be delivered to each of the contracting states.
>
> 372. Failure to adopt these prescriptions of form is not of itself a cause of absolute nullity.

These articles deal chiefly with procedure or diplomatic practice; and the propriety of including such matter in a code is at least doubtful. The negotiation of treaties between states is analogous to negotiation of contracts between individuals; and as in the latter case there may be good business methods and bad business methods of arriving at agreements and of expressing them in written form, so in treaties between states there are excellent methods and poor methods, and in neither case is it advisable to appear to prescribe a legal rule, unless the rule is explicity laid down for obedience and is the source of legal obligation.

Duplessix says also:

> 365. Every state may also contract conventional obligations either with another state or with the nationals of that state.

Each of the two parts of this article requires comment. The first part declares that every state can (*peut*) contract conventional obligations with another state. It declares that the state *has capacity* to make an agreement with another state giving rise to legal obligations. Now, it is a matter of *fact* that states do make agreements with other states. When such agreements have been made the law steps in to raise legal obligations therefrom. Should it not be put so that the fact would be assumed? Besides, the verb "can" (*peut*) may be understood to mean "it is permitted," or "it is not forbidden," as well as "it is legally within the capacity." A word that is susceptible of different shades of meaning, especially where inferences concerning legal rights, obligations, privileges, immunities, and powers, must be drawn, should not be employed in a code.

The second part of the article, saying that every state can contract conventional obligations with the nationals of another state, raises a preliminary

[1] E. Duplessix, *La loi des Nations . . . Projet de code de droit international public. Ouvrage couronné par le Bureau international de la Paix.* Paris, 1906.

question of principle. In an agreement between a state and a national of another state, can the resulting proximate obligation, or obligations, of either party belong in the field of international law? Is not every state obligation in the field of international law an obligation towards another state as such? If a state enters into an agreement with a national of another state, its obligation towards that individual falls within the domain of municipal law. Its obligations to that individual are determined by the contract and its national law; its obligations in international law towards the foreign state to which that individual belongs are determined by the general rules of international law alone or in conjunction with particular treaties governing the case. In this article it therefore appears that the condensation of expression by use of the word "obligations" to mean, first, international obligations, and, secondly, municipal obligations, is objectionable as begetting confusion of thought.

We do not blink a current theory frequently and learnedly maintained that an individual is clothed with international obligations and rights both primarily and by contract. This is the preliminary question of principle referred to, and it must be settled to afford a firm basis for code articles embodying rules.

Dr. Pessôa, in Article 199 of his draft code, says:[2] "A treaty shall not be valid which . . . threatens the fundamental principles of justice or [the fundamental principles] of international law."

Supplying the ellipsis by the bracketed words, we observe that as the fundamental principles of justice are coupled with the fundamental principles of international law, it follows that the former are, in part at least, not fundamental principles of international law, that some at least of its fundamental principles are outside of international law. Now what are these fundamental principles of justice that are outside of international law? And what are *fundamental* principles of justice which would have an effect which principles of justice that are *not fundamental* would not have? Here we have a code clause so difficult to interpret that it would seem better to omit it as stated, and leave consequences to political action.

In his Article 202 Dr. Pessôa says: "Treaties shall be promulgated with the exception of those parts stipulated to remain secret."

The question whether international law shall make it obligatory upon states to make public all their treaties is one that is much discussed nowadays. Publication may take place in different ways. Treaties may be communicated to states not parties; or they may be officially promulgated as a domestic act and foreign nations be presumed to have notice of such promulgation just as they are presumed to have knowledge of the treaty-making power of other states. It is worthy of consideration whether, if a

[2] *Projecto de codigo de direito internacional publico* by Epitacio Pessôa, delegate of Brazil on the Commission of Jurists charged with the codification of international law. Rio de Janeiro, Imprensa Nacional, 1911.

party discharges all its obligations arising out of a given treaty, the other party is at all concerned with the former's domestic promulgation or with its communication to other states, a communication that either has power to make. The article, as it stands, seems in effect to favor secret treaty provisions, for promulgation of a provision that it was agreed to keep secret is here implied to be a violation of a legal obligation. If nothing is said about secrecy in the code, a mere promise to keep the provision secret, though it might give rise to a moral obligation, would not give rise to a legal one.

Professor Fiore proposes the following:[3]

> 763. Anything implying a violation of the constitutional law of either contracting party cannot constitute a lawful subject-matter of a treaty.

In his comment Professor Fiore says that the sovereign of a state can not be regarded as competent to violate the constitution, and since the other party ought not to be ignorant of the constitutional law of the state with which it is negotiating, it is impossible to consider as the lawful subject-matter of a treaty anything directly opposed to the respective constitutional laws of the contracting states. Professor Fiore in this reasoning identifies a state with the sovereign of a state. Cannot a state, for example, in a treaty of peace, duly ratified, assume obligations which involve violation of its constitutional law? The idea of this article is expressed variously in codes and by text-writers. Perhaps the fundamental question is one of competency of a state. Let us put it this way: "A state is not competent to violate its own constitutional law." Here the word competent must mean competent in international law. But it is an accepted view that if states violate their own constitutions (for instance, by ceding territory) such treaty provisions are valid in international law. Their effect in internal law is not matter for an international code. Of course, an exceptional status might be created in the code for treaties of peace. But we would be met with the objection that there are compulsive measures short of war ranging from reprisals like occupation through lower degrees of compulsion to a mere gesture begetting fear, which, like unsuccessful war, produce the necessity of sacrifice.

The code published by David Dudley Field in 1876 has the following article, page 82:[4]

> 202. An obligation created by treaty is extinguished, either,
> 1. By its full performance; or,
> 2. By renunciation of the party entitled to performance; or
> 3. By the subsequent permanent impossibility of performance, without the fault of the party bound; or,
> 4. By fulfillment of the conditions, or the expiration of the time, expressed in the treaty for its extinguishment; or,

[3] *International Law Codified and its Legal Sanction, or the Legal Organization of the Society of States*, by Pasquale Fiore. Translated by Edwin M. Borchard. New York, 1918.

[4] *Outlines of an International Code*, by David Dudley Field. 2d ed., New York, 1876.

5. By breach of its conditions by the nation entitled to performance; or
6. By rescission of the treaty, through common consent.

Is No. 1 serviceable? It seems to be an expression of an identity. An obligation to do something is extinguished by doing it.

No. 2 speaks of renunciation but not of acceptance of the renunciation. In the absence of acceptance, can the renunciation be revoked? Perhaps this No. 2, with some phrase respecting acceptance, should be included in the code since it may happen that an individual national of the renouncing party will in a judicial proceeding invoke the obligation as an existing one.

No. 3 appears to be one case of *rebus sic stantibus*.

No. 4 is another identity as the obligation which arises out of the treaty stipulation is itself limited in duration.

No. 5 speaks of breach of the conditions [of an obligation which we denote by A]. By "breach" must be meant a wrongful act by the obligor state violative of one or more of its own obligations, and Mr. Field means that the discharge of these obligations may be "conditions" of the continuance of the other party's obligation, denoted by A. Now, sometimes a violation of a treaty obligation by one party does not give the other party even an option to treat its own obligation as extinguished. The construction of the treaty is involved, and, the intent of the parties that a particular event shall be a "condition of an obligation" being ascertained, the duration of said obligation is ascertained. In law a condition of an obligation may be an event which terminates this obligation or an event which brings it into existence. Mr. Field here speaks only of an existing obligation. Again, the event may be unconnected with some obligation of the other party, or it may be the non-performance by that party of an obligation. It is the latter that is contemplated in this article. Non-performance of an obligation may result from non-performance of an act or performance of the act, according as the treaty clause reads. "Condition" is a term much used in our common law and also in foreign systems (the French have conditions *casuelles, potestatives, mixtes, suspensives, résolutoires*), and its use in this article suggests the question whether the subject of conditions should receive special treatment in our section. Mr. Field does not use the word elsewhere, and its lay meaning is apparently sufficient here, but "breach of a condition" is rather too compact for clearness.

No. 6 is a repetition of No. 2, applied to each and every obligation of the treaty and requiring acceptance of renunciation.

Professor von Liszt in his valuable work on international law [5] has presented the subject in the form of leading articles attended by commentary. He does not use the word code, the title of his work being, in translation, "International Law Systematically Set Forth," and some of his leading

[5] Franz von Liszt, *Das Völkerrecht systematisch dargestellt.* 9th ed., Berlin, 1913.

articles are remarks on practice. One of his articles will be quoted here because it raises an essential question of principle. He says, p. 161:

> The capacity to conclude treaties proceeds from sovereignty. However, it is customary the greater part of the time to accord to part-sovereign states the right to conclude treaties on condition that they shall not have political character (particularly commercial treaties).
>
> In a compound state the capacity which belongs in respect of treaties to each member state is determined by the constitution in force.

Here are problems suggested by the terms "part-sovereign states" and "compound states." The code must deal with them somewhere in a definite way. Possibly that may be done sufficiently in the section on states, but the questions that arise with respect to treaties may be suggested here. Professor Liszt instances Egypt, Bulgaria, Korea, Tunis. The change in status of some countries in recent years has not lessened the importance of the question. So far as the *conclusion* of treaties by non-sovereign countries is concerned, there is no difficulty. The sovereign state places its treaty-making power where it likes. Whether Australia is competent to conclude a treaty with a sovereign state respecting Australian tariffs, is a question for the sovereign state known as the British Empire to decide. But the treaty having been made, upon whom do the international obligations rest? Would the British Empire have any international obligations or any international rights in the matter? Would Australia have any? Would not the international obligations and rights of the other contracting state have regard only to Great Britain, Australia only appearing in the subject-matter? If this is the correct view, theoretical difficulties disappear. If an international legal obligation can only exist as flowing from one fully sovereign state to another full sovereign state, Australia's obligations would not be such. A not fully sovereign state, like an individual, is privileged to enter into a contract with a sovereign state, meaning of course privileged internationally. This contract is not a treaty unless treaty-making power on the subject is lodged with the not fully sovereign state.

Dr. Bluntschli [6] allows sixty articles to his section on "Treaties," and has a few more elsewhere concerning the effect of war on treaties. We select two articles for comment.

> 449. In the interpretation and application of treaties of alliance, both parties must proceed in true loyalty, good faith, and sincere friendship.

Dr. Bluntschli in his comment on this article says that these moral considerations should never be excluded in interpreting any treaty whatever. If the article is retained, should it not be made general? Should it not be omitted altogether, and thus left only in the domain of the moral law? And

[6] Johann Kaspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (3d ed., 1878), secs. 402–461, 538, 718, 726. A French translation by C. Lardy was published in Paris in 1881.

thirdly, since this article is one of four on alliance in particular (Articles 446–449), is there place for special treatment of treaties of alliance? Should, or should not, a treaty promise to make war give rise to a legal obligation or only to a moral one? If the latter, should not there be an article excepting such a promise from the general rule that a legal obligation springs from a treaty promise? A rule that a treaty stipulation in contravention of international law is void does not cover the case, since the making of war, even international assault, is not illegal.

> 460. The obligated state can be held to fulfill an obligation that is burdensome and disadvantageous to it, but cannot be expected to sacrifice its existence or necessary development to treaty-faith.

The important phrase in this article is "necessary development". Mr. Lardy's French translation of the article is:

> On peut exiger d'un Etat qu'il exécute les engagements onéreux contractés par lui, mais on ne saurait lui demander de sacrifier à l'exécution du traité son développement et son existence.

The original German is:

> Der verpflichtete Stat kann angehalten werden, auch eine ihm lästige und nachtheilige Verbindlichkeit zu erfüllen, aber niemals darf ihm zugemuthet werden, dass er seine Existenz oder seine nothwendige Entwicklung der Vertragstreue zum Opfer bringe.

"Necessary development,"—here is indeed room for wide differences of opinion between states. Can it be narrowed?

With this little baggage we may again approach our task of drafting articles on treaties. These articles will be accompanied by comment, and among them will appear some that are stated only for purposes of discussion. It seems premature to formulate a group of rules of interpretation, for the general question touching them should first be resolved, inasmuch as the exclusion that would result from a negative answer would make unnecessary the labor of framing them properly.

Rules for interpretation of treaties have for their sole object ascertainment of the intention of the parties. These rules, at least the majority of them, are perhaps not rules of international law at all, but only aids in the ascertainment of the intention of the parties, without having any obligatory force. Many of these so-called rules are mere argument, belonging to the realm of reason rather than that of international law. In determining the intention of the parties the conclusion reached by a court would be based upon reasons as reasons, and not on reasons as rules of law.

Municipal law comes in on grounds of public utility to lay down rules that shall prevail irrespective of the real intention of the parties. Such is the rule of "best evidence" in the common law. In international law is there any such restraint? In international law the ascertainment of mutual intention is the final cause of interpretation and some so-called rules of interpretation

are merely axiomatic statements that appeal to the mind as proper aids in arriving at a determination of the mutual intent. The judicial determination will rest on a conviction reached by reasoning freely from all facts.

Let us again take for a specific instance the rule that "ordinary words should be taken in their ordinary sense, technical words in a technical sense." Is there anything mandatory in this rule? Is not the meaning rather that it is probable, in the absence of evidence of the contrary, that the parties intended the specific ordinary words to be taken in their ordinary sense, and the technical words in their technical sense? Would not the mind of an international judge treat this rule as a reasonable argument on probabilities, and weigh those probabilities with all other probabilities which he derives from other arguments, or so-called rules, *pro* and *con?* If the matter is purely one of reasoning, is it not outside of the law, and, in this instance, not even a part of its foundation? Is it not merely finding a fact? If, however, the "rule" is mandatory, so that a court must apply it, it is a part of the law.

Account must be taken however of the basic objection that might be advanced, that in a treaty as in a private contract, there may be no actual mutual intent; that although there is common consent that there shall be a contract, the meanings attached to its terms by the parties are not identical, that the law, on the ground of public utility, presumes them identical, and in order to give effect to this presumption establishes legal rules of interpretation which are exclusive of evidence that will establish a failure of the contracting minds to meet. Which theory shall we adopt? It may be that the latter theory can have bearing only upon the admission of some of the proposed rules of interpretation.

The following nineteen articles have been drafted in an endeavor to bear in mind the cautions suggested in the foregoing lines. As regards substance, some are included, as has been intimated, only in order to bring to the front questions that seem fundamental and necessary to be answered.

1. A treaty is an agreement in writing between states.
2. The promises contained in a treaty are binding on the parties.
3. The obligations created by treaty arise at the moment the project of treaty becomes a treaty by exchange of mutual consent thereto by competent organs of the parties.
4. The competence of state organs to give consent is dependent upon national law.
5. States are presumed to know the national law of other states in this regard.
6. The competent state organs communicate their consent directly or through duly empowered individuals.
7. No obligation arises from consent obtained from state agents by means of duress exerted upon them personally.
8. Treaty obligations produce rights only in the co-contracting states.
9. A treaty stipulation in contravention of international law is void.

10. The obligations arising out of treaties are not modified by changes in the internal organization of states.
11. Treaty obligations which have not been assumed expressly with a view to war are suspended during a state of war between the parties.
12. Treaty obligations which are suspended during a state of war between the parties revive at its conclusion, except those obligations which are incompatible with a suspension.
13. A treaty obligation terminates on disappearance of the obligee or obligor state, subject to the international rules of succession.
14. A treaty obligation is terminated by renunciation on the part of the obligee state.
15. When an essential treaty obligation has been violated by one state, the other parties to the treaty have the power to cancel the whole treaty.
16. If the power to cancel a treaty on the ground of its violation is not exercised within a reasonable time after the violation has become known, the power ceases to exist.
17. The intention of the parties is the measure of a treaty obligation.
18. A treaty obligation is suspended when it becomes impossible of fulfillment or comes into conflict with the right of self-preservation of a party.
19. When mutual consent is established by exchange of ratifications the treaty operates as to public rights retrospectively from the date of its signature.

Here might be added such articles on interpretation of treaties as may be deemed proper to be made mandatory. Professor Fiore's articles on interpretation of treaties are perhaps the fullest presentation of the subject in codified form.[7] He goes extensively into grammatical and logical interpretation. On the other hand, some proposed codes omit all treatment of grammatical and logical interpretation. Compare Bluntschli's code. Which, if any, of these ideas should be expressed in the code? In municipal law we have rules for construction and interpretation of statutes and rules for interpreting contracts, and the analogies afforded may light the way. If the municipal rule forbids consideration of certain relevant evidence or commands what comparative weight shall be accorded it by the judge, it is indeed law. If a so-called rule does neither, it is not law but argument, a rule in the sense of a general proposition, not a universal one. Now what rules for interpretation of treaties exist or should exist as international law?

The foregoing articles are now repeated one by one with comment, which is directed to the central idea or to some peculiarity of phraseology with the aim of bringing into prominence a few of the important queries in our path. It is needless to say that any draft section must undergo searching criticism as to expression as well as to content and sequence.

[7] Fiore, *International Law Codified*, 1918, secs. 797–821.

1. A treaty is an agreement in writing between states.

A term of precise meaning is needful to serve in international law as the analogue of contract in municipal law, and the word treaty naturally suggests itself. Or shall it be "convention" or "contract"? If the word "contract" be substituted in this article for "treaty", the same substitution should be made in the following articles, using "contractual" where "treaty" is an adjective, and so with "convention" and "conventional." In such case, the word "treaty" would seem to have no place in the section, being merely a form of agreement giving rise to no legal obligations distinct from contractual obligations. In English and American law, the requirement of a writing for certain contracts is a rule of evidence, and many contractual obligations spring from oral language and conduct. Whether this can be the case in international law must be considered, and may have bearing upon the terms selected.

This article is a definition. As the word treaty is used in this section of articles, it has a definite meaning somewhat different from its customary use. Here it includes agreements that are designated by the words convention, protocol, etc. It seems therefore advisable to include a definition of the term.

According to this definition the agreement must be in writing to be a treaty, but no particular form is exacted. Thus a written promise to pay money might come within the definition, the contractual relation being no other than if the promise were couched in usual treaty form. This enlargement of the meaning of the term brings into question whether the entire agreement must be in writing to be a treaty. The municipal law of contracts will furnish analogies. If the answer is based on law, that law should be expressed in the code; if only on reason, equity, etc., further statement would be superfluous, unless in a general way as an article introductory to the entire code to the effect that reason, etc., are the basis of international law. Considerations of general international utility should determine whether international law shall impose the necessity of having a treaty in writing in order to create legal rights and obligations thereunder.

2. The promises contained in a treaty are binding on the parties.

Some article of this import seems necessary. The preceding article is merely definition. This one brings in legal consequences. A treaty gives rise to international legal obligations. These obligations may be numerous or few. The obligations assumed by one state are the consideration for assumption of other obligations by the other party. The whole subject of treaty obligations, it seems, can be fairly dealt with in the light of municipal systems of law on private contracts. In making use of this analogy care must be used to bear in mind the difference between an individual and a state. Contracts between corporations in municipal law afford some useful

analogies, because in every case, as with states, they are represented by individuals.

Is a treaty void if without consideration? Is the case analogous to the *nudum pactum* of private law? If so, the agreement is not a treaty, and its obligations reside in the domain of international morality or etiquette. But a state may desire to assume a legal obligation by treaty without consideration in the shape of an obligation assumed by a co-contracting party. And first of all, must we not carefully compare our national law with that of civil law countries? Does our "consideration" exactly match their "causa"? Let us be careful not to attempt to carry into the draft code principles of national law on a mistaken assumption that they are already universal. To propose them, with the knowledge that they are not general but in the belief that they merit adoption, is proper; and where there is a lacuna in international law that should be filled, proposals are not only proper but exigent.

3. The obligations created by treaty arise at the moment the project of treaty becomes a treaty by exchange of mutual consent thereto by competent organs of the parties.

Much matter regarding negotiation of treaties to be found in textbooks is here excluded on the theory that it is immaterial how informal a negotiation may be, provided the states concerned authoritatively consent.

The effect of treaties upon private rights is a matter of treaty construction and therefore should not appear at this point.

4. The competence of state organs to give consent is dependent solely upon national law.

5. States are presumed to know the national law of other states in this regard.

Perhaps Article 5 should be part of No. 4, or be omitted. It may be deduced directly from Article 4, which is absolute. Knowledge or ignorance of pertinent national law seems therefore immaterial, and a legal presumption on the point accordingly useless. This is tentatively inserted by way of illustration of many deductions and inferences. If the deduction or inference can be used as basis for further development to which the main proposition does not clearly point, utility justifies its inclusion. In the case of this article I see no such condition, but others may.

6. The competent state organs communicate their consent directly or through duly empowered individuals.

It may be queried whether this article is necessary in this place. It introduces the subject of state agents. On the whole, it is thought best to have it here.

7. No obligation arises from consent obtained from state agents by means of duress exerted upon them personally.

The case could seldom arise with present elaborate methods of making treaties, but it is conceivable. A state, having ratified a treaty, would not

empower an agent to communicate consent if it were not willing this should be done, but some unforeseen event might happen after such authorization that would influence its agent to stay his action. Moreover, in some agreements falling within our definition of treaty consent is given by a duly empowered negotiator without precautionary ratification by the state.

The term "duress" has a technical meaning in common law and two questions are raised by its use here. First, is that meaning the one we wish in this code, or is the meaning of some other word, say constraint, better for our purpose? Secondly, should not a common law technical term be avoided unless it has exact equivalents in other languages, at least in French?

This article regards only the motive to avoid pain. A motive to gain pleasure may induce the same action. Bribery is as improper as threats, but does not have the same legal effect as duress.

8. Treaty obligations produce rights only in the co-contracting states.

Many treaties have only two parties, some have several, and some are universal, or at least in contemplation of law there may be a treaty to which all the states are parties. In a treaty to which there are several parties, has each party a legal interest in every obligation arising from the treaty? For instance, states A, B, and C, agree not to use gas against one another in time of war, and war breaks out between A and B. A uses gas against B. Was A under treaty obligation to C not to use gas against B? Was A under treaty obligation to D, a non-contracting Power not to use gas against B? The code should furnish a rule or rules governing these questions. The article here drafted governs the second; does it deal with the first? When all states are parties to the treaty, the treaty obligations which are merely contractual when there are only two parties become a general or social contract, or, in other words, a source of international law. Now, assuming the existence of a universal treaty not to use gas in time of war, if A uses gas against B, what is C's legal interest with regard to the act? If C has any right that has been thus violated, is it a contractual one, or does it rest immediately upon the international law that happens in this case to have been made by treaty? Suppose the use of gas to have been forbidden by international law in the absence of treaty, should not the position of a third state be the same with regard to such act? Is there any international law such that A's illegal act resulting in damage to B also violates A's obligations to the other states for the sole reason that it is contrary to international law? Reverting to the above illustration of a tripartite treaty, would C's position with regard to the supposed act be the same as if the treaty were a universal one? If A's act towards B is thought not to be an injury of a right of C, suppose that damage results therefrom to C. Would, or would not, A be *legally* responsible for it? Is this *damnum absque injuria?* Or, if loss does not result, is it *injuria absque damno?*

9. A treaty stipulation in contravention of international law is void.

Should the idea in this article be carried to the section on states, as dealing rather with the capacity of a state to assume an obligation in contravention of international law? There it would have a more general statement of which the present article is a corollary.

10. The obligations arising out of treaties are not modified by changes in the internal organization of states.

This article seems to raise no query. The principle is not now controverted.

11. Treaty obligations which have not been assumed expressly with a view to war are suspended during a state of war between the parties.

The word "suspended" here is not meant to imply that the obligations will necessarily revive; perhaps some word like "inoperative" or "inactive" would be better. However, we often speak of "indefinite suspension."

12. Treaty obligations which are suspended during a state of war between the parties revive at its conclusion, except those obligations which are incompatible with a suspension.

Much has been written about termination of treaties by war, but it is more clarifying to deal with treaty obligations. A treaty often gives rise to many obligations, some of which may be executed before war occurs, and others not yet executed. When obligations are executed they no longer exist, and can not be affected by a later war. If all the obligations are discharged the treaty is not a treaty at all, except reminiscently. The term may then denote other rights, as of property, which have been acquired by treaty; but the parties are not longer bound by a contractual tie. This is a difficult article to word correctly. For instance, obligations on one party which have been executed may be the consideration for assumption by the other party of obligations which have not been executed but which are in their nature such as could not be revived after the war. In view of the unsettled state of international law on the subject of termination of treaties by war, it is suggested that, so far as the doubtful field is concerned, a definite rule be laid down in the code, for the reason that in the treaty of peace the parties can fully regulate their future relations. Perhaps the simplest way would be to provide that all treaties which are suspended are annulled subject to contrary provisions in the treaty of peace.

13. A treaty obligation terminates on disappearance of the obligee or obligor state, subject to the international rules of succession.

Development of the subject of succession to treaty obligations would appear under "Succession" more appropriately than here.

14. A treaty obligation is terminated by renunciation on the part of the obligee state.

The query whether acceptance of renunciation must take place to put an end to the obligation, and in what form, has been raised above.

15. When an essential treaty obligation has been violated by one state, the other parties to the treaty have the power to cancel the whole treaty.

The word "essential" is here the crux. It is agreed that some violations will not give a power to cancel the whole treaty. The question seems to be one of failure of consideration. We have not, however, above made consideration an essential element of a treaty. Should this be done?

16. If the power to cancel a treaty on the ground of its violation is not exercised within a reasonable time after the violation has become known, the power ceases to exist.

What is a "reasonable time" is a judicial question, the analysis of which is not subject to rules. The word "power" is here used as being the correlative of "liability." The violating state is under the liability of having the treaty cancelled. The violating state is under no obligation in this respect, and as obligation is correlative of "right" it would be inaccurate to say that the other state has a *right* to cancel the treaty. Through looseness of usage the word "right" is often used indiscriminately to cover what in a given case may be a privilege, a power or an immunity.

17. The intention of the parties is the measure of a treaty obligation.

This and the remaining articles deal with construction and interpretation. The words construction and interpretation have different meanings in our law, but they tend to the same end, and should not appear in the code in the interest of simplicity. Many articles might be added which may seem to be merely reasonable considerations serviceable in ascertaining the intention of parties rather than to be mandatory, but as the proposals of that nature are very numerous and furnish a good subject for separate treatment, a halt is made here.

18. A treaty obligation is suspended when it becomes impossible of fulfillment or comes into conflict with the right of self-preservation of a party.

This is an attempt to express in a definite way the accepted view that treaty obligations may cease simply by reason of a change in circumstances. This idea is expressed by the Latin phrase *rebus sic stantibus*. A slight change of circumstances does not have this effect. A change of circumstances eventuating in impossibility of performance does have this effect. Between these two extremes there is a field in which some cases may be cases of almost impossibility, where the obligor would find it very difficult and burdensome, far beyond expectations at the date of treaty, to carry out

its provisions. If in such cases a state is to be privileged to disregard its promises, it should be by virtue of some principle or rule that can be invoked. But is it to be so privileged, in *law*, beyond self-preservation? And the right of self-preservation should be carefully defined elsewhere in the code. The words "is suspended" imply that the obligation may revive when the obstacle no longer exists, and if this is the intention the article should be completed by a clause to that effect.

19. When mutual consent is established by exchange of ratifications the treaty operates as to public rights retrospectively from the date of its signature.

This is a well-known rule of construction subordinate to the rule of intention of the parties.

PROPOSED RULES FOR THE REGULATION OF AERIAL WARFARE

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When the World War, in which aircraft was employed for the first time on an extensive scale as an instrument of combat, broke out, there were few conventional rules and naturally little or no customary law in existence governing the conduct of hostilities in the air. There was, to be sure, the declaration prohibiting for a period of five years the launching of projectiles and explosives from balloons or by other new methods of a similar nature, signed at The Hague in 1899 and renewed in 1907 for a period extending to the close of the third peace conference. Since the third conference has never been convoked, the declaration may be regarded as still binding on the states which have ratified it, in a war in which both or all the belligerents are contracting parties. But it is significant that only about half the states represented at the second conference signed the declaration, and among those which did not were Germany, France, Russia, Spain and Italy. It thus happens that the principal military states of Europe are not parties to it and its value therefore is slight.[1] In consequence of the so-called "solidarity" clause it was not binding upon any of the belligerents during the World War, not even upon those which had ratified it.

In the second place, there is Article 25 of the Hague Convention of 1907 Concerning the Laws and Customs of War on Land, which declares that "the attack or bombardment *by whatever means*, of towns, villages, dwellings or buildings which are undefended, is prohibited." As is well known, the words in italics were added in 1907 to the corresponding article of the Convention of 1899 upon the proposal of the French delegation for the express purpose of prohibiting the bombardment of "undefended" places by means of aircraft.[2] Unlike the declaration of 1907, regarding the launching of projectiles, its duration is unlimited, but like it, it has no binding force in a war in which one or more of the belligerents are not parties. For this reason it was not binding upon any of the belligerents during the World War.[3] Different, however, from the declaration of 1907, the convention of

[1] Compare Fauchille, "*Le Bombardement Aérien*," *Revue de Droit International Public*, t. XXIV, p. 66; Rolland, "*Les Pratiques de la Guerre Aérienne*," etc., *ibid.*, t. XXIII, p. 505; and Merignhac, "*Le Domaine Aérien*," etc., *ibid.*, t. XXI, p. 226.

[2] *Actes et Documents de la deuxième Conférence*, t. III, pp. 15–16.

[3] Neither Bulgaria, Italy, Montenegro, Serbia, nor Turkey, all of which were belligerents during the World War, had ratified it. Nevertheless, it may be argued and has been argued,

which it is a part has been ratified by most of the important military states of Europe.[4] But even in a war in which the article is binding on all the belligerents, it would not likely be of any great value, because it is based upon the illogical and impracticable distinction between "defended" and "undefended" places. It forbids the bombardment by aircraft of "undefended" places only and thereby inferentially permits the bombardment of those which are "defended", but it lays down no test for determining when a place belongs to one or the other category.[5] If the test which is generally accepted for distinguishing between defended and undefended places in land and maritime warfare be applied to aerial bombardment, it will lead to absurd results, because the existence of certain facts which give a city or town the character of a "defended" place in respect to land and naval bombardment cannot be justly said to have any such effect in determining the liability of a place to bombardment by aircraft.

The stipulations of the Convention Relating to International Air Navigation, signed by the plenipotentiaries of the Allied and Associated Powers at Paris on the 13th of October, 1919, and which has now been ratified by the governments of ten of the signatory Powers and adhered to by one non-signatory Power,[6] are by its express terms binding on the parties only in time of peace.[7] In any case, its rules relate only to international aerial navigation and not at all to the conduct of war. Certain writers have reproached the authors of the convention for not having occupied themselves

that the article does not embody a new rule of international law but is merely declaratory of an existing customary rule and as such was binding on all the belligerents regardless of the status of the convention of which it is a part. Compare to this effect Fauchille, "*Les attentats Allemands contre les personnes et les biens en Belgique et en France*," *Rev. Gén. de Droit Int. Pub.*, t. XXII, pp. 403–409; Pillet, *ibid.*, t. XXIII, p. 21; Rolland, article cited, p. 509; and Garner, *International Law and the World War*, Vol. 1, pp. 20–21. German jurists themselves admitted during the World War that the stipulations of unratified conventions are binding when they are merely declaratory of the existing customary law. See to this effect Zitelmann in *Modern Germany* (p. 604), being an English translation of a German work entitled *Deutschland und der Welt-Krieg;* Strupp in the *Zeitschrift für Völkerrecht*, Vol. IX, pp. 281 ff.; Von Liszt, in the *Frankfürter Zeitung* for Oct. 29, 1916, and de Visscher, *Belgium's Case*, p. 66. There is room for doubt, however, whether Article 25 was merely declaratory of an existing customary rule of international law.

[4] See the table of ratifications in Scott, *The Hague Conventions and Declarations of 1899 and 1907*, pp. 236–239.

[5] Compare Pillet, "*La Guerre Actuelle et le Droit des Gens*," *Rev. Gén. de Droit Int. Pub.* t. XXIII, p. 27.

[6] The ratifying Powers are: Belgium, Bolivia, France, Great Britain, Greece, Italy, Japan, Portugal, Jugo-Slavia and Siam. The only adhering Power is Persia.

[7] Article 38 of the convention, as modified by protocols signed in May, 1920: "In case of war, the provisions of the present convention do not affect the freedom of action of the contracting parties either as belligerents or neutrals."

I have analyzed and commented upon the provisions of this convention in two articles entitled "*La Réglementation Internationale de la Guerre Aérienne*," published in Nos. 4–6 of the *Revue de Droit International et de Législation Comparée* (1923–24).

equally with the formulation of rules governing the conduct of aerial warfare.[8] But apparently the conference either considered the task too large or doubted the expediency at that time of attempting to formulate a code of rules for the conduct of aerial warfare, considering the lack of respect shown by the belligerents during the recent war for the existing conventions.[9] At the Fourth International Congress of Aerial Legislation, held at Monaco in 1921, the silence of the convention of 1919 on the subject of aerial warfare was the subject of some criticism, and it was decided to place on the program of the next congress, to be held at Prague in October, 1922, the question of the regulation of aerial warfare.[10] At this congress, M. Hobza made a report in which he dwelt upon the urgent necessity of international regulation, indicated what he considered to be the principal ends to be sought by such regulation, and advocated the prohibition of certain methods of aerial warfare. The congress, after hearing his report, charged its *comité directeur* with the task of formulating an *avant-projet* concerning the rules of aerial warfare.[11] The subject was again on the program of the congress at its meeting at Rome in October, 1923. It was likewise the subject of discussion at the thirty-first Conference of the International Law Association held at Buenos Aires in 1922.

The Conference on the Limitation of Armaments, held at Washington in 1922, did not occupy itself at all with the question of the regulation of aerial warfare, and the treaty for the limitation of armaments signed by the Powers represented at the conference, contained no limitations either upon the number or the size of airships which the contracting Powers might keep or construct.[12] However, a treaty was signed on the 6th of February, 1922, by Great Britain, France, Italy, Japan and the United States in which it was recited that the use in war of asphyxiating, poisonous or other gases, and all analagous liquids and materials or devices, having been justly condemned by the general opinion of the civilized world and having been pro-

[8] Compare the remarks of M. Henry–Coüannier in the *Compte rendu du IV^ème Congrès de Législation Aérienne* (1921), p. 29. M. Henry–Coüannier proposed that Article 38 be modified to read that in case of war the stipulation of the convention should not affect the freedom of action of the contracting parties when such action was "exercised according to the law of nations" (*ibid.*, p. 41). But the congress did not approve the proposal.

[9] Compare the remarks of M. de Lapradelle (who took part in the drafting of the convention of 1919), *ibid.*, p. 44.

[10] There was some objection on the ground of expediency to the proposed discussion of the subject, but it was pointed out that conventions for the regulation of land and naval warfare had already been concluded and that there was no reason why aerial warfare should not be similarly regulated. In fact, considering the probable rôle and character of aerial operations during the next war, there was even more reason why it should be regulated by an international convention. See the remarks of M. Hobza, *ibid.*, p. 221.

[11] *Ibid.*, pp. 221–225.

[12] See the report of the American Delegation to the President of the United States, in which it was stated that such limitation was considered impracticable. Text of the report in this JOURNAL, Vol. 16, p. 190.

hibited by a convention to which a majority of the civilized Powers were parties, the signatories declared their assent to such prohibition, agreed to be bound thereby as between themselves, and to invite all other civilized nations to adhere thereto, to the end that the prohibition should be universally accepted as a part of international law, binding alike the conscience and practice of nations.[13] The prohibition upon the employment of these agencies is general in character, and was evidently intended to forbid their use in aerial as well as in land warfare. In view of the prospect that in the wars of the future the airship will play an increasingly important rôle and that poisonous liquids and chemicals will be employed on an extensive scale and with frightful results,[14] this prohibition, if generally accepted, will constitute a very important restriction on the conduct of aerial warfare. The five signatory Powers have ratified the treaty and it is therefore binding upon them in a war between two or more of them. But it would seem from the terms of the treaty that it would not be considered as binding upon one of them in a war with a non-adhering Power. It will be noted that the treaty forbids only the use of gases and analagous liquids, materials and devices; it imposes no prohibition or restriction whatever upon the operations of bombardment so long as a belligerent refrains from making use of these agencies in his bombarding attacks. Subject to this limitation, the whole matter of bombardment by land, sea or air was left untouched by the treaty.

The Washington Conference, however, was not indifferent to the importance, not to say the necessity, of international regulation of the new methods of war to which the invention and perfection of aircraft have given rise, but for obvious reasons it did not feel competent itself to undertake the difficult task of formulating the regulations which it evidently felt to be desirable. In these circumstances the conference adopted the wiser course

[13] Text of the treaty in SUPPLEMENT to this JOURNAL, Vol. 16, p. 57.

[14] Professor Slosson remarks, apropos of the rôle which chemistry and aeronautics are likely to play in the wars of the future, that a single airship with two men will be able to fly over a warship at great height and besprinkle its decks with a liquid so corrosive that three drops touching the skin of a man will be sufficient to kill him, and so persistent, that a small quantity lodging in its crevices will render the ship uninhabitable for days. *Exhibit under the Auspices of the National Research Council*, prepared by the Chemical Warfare Service, Washington, 1921. It was stated in the New York *Times* of March 3, 1921, that the Chemical Warfare Service of the United States had already discovered a toxic liquid so strong that three drops of it coming in contact with the skin of a man would cause his instant death and that "falling like rain from nozzles attached to airships the liquid would kill everybody in its path." Compare also the following from an article by Professor A. M. Low in the *Nineteenth Century* for Sept. 1923 (p. 356): "Various forms of poison gas more terrible than any at present, will be used and the question of protection will become a highly scientific one. Another weapon—incidentally my own invention—will be jets of water highly charged with electricity. . . . Aeroplanes will be equipped with electric impulse guns firing an enormous number of bullets a second, and no clumsy trailing aerials will be necessary to pick up wireless instructions."

of entrusting the task to a body of legal and technical experts. Accordingly, a resolution, dated February 4, 1922, was adopted providing for the appointment of a commission of jurists composed of not more than two members representing each of the five Powers participating in the conference (Great Britain, France, Italy, Japan and the United States) to consider and report to each of the said Powers upon the two following questions: (1) Do the existing rules of international law adequately cover new methods of attack or defense resulting from the introduction or development, since the Hague Conference of 1907, of new agencies of warfare; and (2) if not so, what changes in the existing rules ought to be adopted in consequence thereof, as a part of the law of nations. The commission thus provided for was authorized to request assistance and advice from experts in international law and in land, naval and aerial warfare. It was agreed that when the report of the commission should be made, the signatory Powers would thereupon confer as to the acceptance thereof and upon the course to be followed to secure consideration of its recommendations by the other civilized Powers. By a subsequent resolution adopted the same day it was agreed that it was not the intention of the parties in providing for the appointment of the commission to report upon the rules of international law respecting new agencies of warfare or that it should review or report upon the rules or declarations relating to submarines or the use of noxious gases and chemicals already adopted by the five Powers represented at the conference.[15] The views of the signatory Powers regarding the employment of these agencies of warfare having already been embodied in a treaty, there was no need for their reconsideration by the commission.

The members of the commission chosen were John Bassett Moore and Albert H. Washburn for the United States; the Rt. Hon. Sir Rennell Rodd and Sir Cecil Hurst for Great Britain; Professors de Lapradelle and Basdevant for France; Senator Vittorio Ricci for Italy, and Baron Matsui and Mr. Matsuda for Japan. The Hague having been chosen as the place of meeting, the Dutch Government was invited to be represented, and Professors Struycken and Van Eysinga appeared as its delegates. In addition to the members of the commission, there was a considerable body of technical experts (more than fifty altogether) especially in military, naval and aerial matters. The commission held thirty plenary sessions in the Peace Palace, beginning on December 11, 1922, and ending on February 19, 1923.

It was clear that the "new methods of attack and defense resulting from the introduction or development since the Hague Conference of 1907, of new agencies of warfare", which the conference had primarily in mind in providing for the appointment of the commission were those resulting from the invention and development of aircraft as instruments of combat. But the invention and perfection of wireless telegraphy, which though not an agency of destruction, had also taken place since 1907, and had played an

[15] Texts of both resolutions in SUPPLEMENT to this JOURNAL, Vol. 16, pp. 74–75.

important rôle in the conduct of the World War and would probably play a still more important part in the next great war. Like the airship, the employment of radio in time of war was largely unregulated by international conventions.[16] In these circumstances it was finally agreed by the parties to the resolution, that the work of the commission should be confined in the main to the formulation of rules governing the use of radiotelegraphy and aircraft. The rules prepared by the commission were embodied in the form of a "code" consisting of two parts; Part I dealing with the control of radio in time of war (12 articles) and Part II with the conduct of aerial warfare (62 articles). They were accompanied by a general report in which some of the articles are interpreted, and in some cases there is a statement of the reasons why the particular solution finally agreed upon was adopted by the commission. The rules proposed are, of course, merely recommendations to the various governments represented on the commission. As yet, no action appears to have been taken by any of the governments to which they are addressed.

In the preparation of its rules the commission, we are told, worked on the basis of a draft submitted by the American delegation and a similar draft covering, in general, the same ground submitted by the British delegation, and that in the discussion of the various articles, the provisions of each, as well as amendments and proposals submitted by other delegations, were taken into consideration. The earlier articles deal with such matters as the classification of aircraft, the distinctive external marks which public aircraft, both military and non-military, shall bear, the papers which they shall carry, etc. The right of conversion of non-military aircraft into military aircraft is expressly recognized and the question of the place where the conversion may be effected—a question upon which the London Naval Conference of 1909 was unable to reach an agreement—was solved by a provision that the conversion must take place within the jurisdiction of the belligerent state to which the aircraft belongs, and *not on the high seas* (Art. 9). This rule was originally proposed by the Japanese delegation and a similar proposal was later made by the American delegation. The French delegation, however, declined to accept the article.

[16] Article 3 of the Land War Neutrality Convention of 1907 forbids the erection of radio stations by belligerents in neutral territory, and Article 5 obliges neutral Powers not to allow such erection. See also Articles 8 and 9 of the same convention; Article 8 of the Convention of 1907 for the Adaptation of the Geneva Convention to Maritime Warfare, relative to radio installations on hospital ships, and Article 5 of the Convention of 1907 Concerning the Rights and Duties of Neutral Powers in Naval Warfare, which forbids belligerents from erecting wireless telegraph stations in neutral ports and waters for the purpose of communicating with the belligerent forces on land or sea, and Article 25 which obliges neutrals to prevent such acts. See also Articles 45 and 46 of the unratified Declaration of London, relative to the condemnation of neutral vessels for transmitting intelligence to the enemy. The International Radio Telegraph Convention of 1912 deals mainly with radiotelegraphy in time of peace, although it contains several articles bearing upon the question of radio control in time of war. See especially Articles 8, 9 and 17.

The principle of the Declaration of Paris of 1856 abolishing privateering in naval warfare is extended to the conduct of aerial warfare, and it is expressly declared that belligerent rights can only be exercised by military aircraft under the command of persons duly commissioned by or enlisted in the military service of the state, and equipped by crews so enlisted (Arts. 13–14). Members of the crew of a military aircraft must wear a fixed distinctive emblem of such character as to be recognizable at a distance in case they become separated from their aircraft. Like the Hague regulations relative to combatants in land warfare, the proposed rule does not therefore insist upon a uniform. No aircraft other than belligerent military aircraft may engage in hostilities in any form, and the term "hostilities" is declared to include the transmission during flight of military intelligence for the immediate use of a belligerent (Art. 16). This is a logical and necessary prohibition, considering that one of the principal services of aircraft in war is reconnaissance and observation. But the prohibition is limited to the communication of military information *during the course of a flight.* Once the flight is terminated, the aviator is within the jurisdiction of some state and is subject to the laws or regulations of that state concerning the transmission of military intelligence for the benefit of belligerents.

Having in mind, doubtless, the controversy over the arming of merchant vessels for purposes of defense during the World War, the proposed code provides that no private aircraft, when outside the jurisdiction of its own country, shall be armed in time of war (Art. 16). Whatever necessity there may be for allowing merchant vessels to carry arms for their own protection, such a procedure would hardly be effective in case of aircraft, for the reason that such firearms as they might carry would be insufficient against an unlawful attack. The context indicates that the aircraft here referred to are those of belligerent nationality only and does not include neutral aircraft. Nor does the prohibition apply to public aircraft of a non-military character, such as those charged with police and customs services, the arming of which may be necessary to enable them to discharge effectively their duties.

Regarding the nationality of aircraft, the proposed code limits itself to the simple disposition that no aircraft may possess more than one nationality (Art. 10). This is the rule embodied in the International Air Convention of 1919 (Art. 8), but unlike the latter convention, it lays down no rules for determining what that nationality shall be, either when the owner is an individual or an incorporated company, nor any rules regarding the registration of aircraft. Under Articles 6 and 7 of the Air Convention, no airship can be registered by one of the contracting states unless it belongs wholly to the nationals of such state, and when so registered it possesses the nationality of that state and of that state alone. In other words, no foreign-owned airship can be registered in another state and thereby acquire its nationality, so that the nationality of aircraft will be not only that of the

owner but at the same time that of the state of which he is a national, and also of the state in which it is registered. But in case the convention should not be generally ratified, this rule regarding registration and nationality may not be followed by some states; it may happen, therefore, that the nationality of the owner will not be the nationality of the airship, for example, in the case of a French-owned airship registered in Germany, and consequently possessing German nationality. In such a case the exercise of the right of capture in aerial warfare may raise the same difficulties that were raised during the World War in respect to the right of capture of merchant ships which were enemy-owned but which were registered by and possessed the nationality of neutral governments.[17] It would seem, therefore, that it is not sufficient to say, as the rule proposed by the Commission of Jurists does, that no airship may possess more than one nationality. Should it not also pronounce on the question whether that nationality shall be that of the owner or that of the state where it is registered? If the rule of the convention of 1919 which identifies the nationality of the owner with that of the state in which it is registered should become a generally accepted rule of international law, no such difficulties as I have indicated could arise. But is it safe to assume that the convention will be generally ratified? The fact that three years have now elapsed since the signing of it and that only ten of the signatory Powers have notified their ratifications, does not indicate any particular enthusiasm for it.

Whether military aircraft should be permitted to use tracer bullets for the purpose of determining the correctness of their aim, and of incendiary bullets as a means of attack against lighter-than-air craft for the purpose of setting fire to the gas which they carry, was a question upon which there was considerable discussion among the members of the commission and not a little difference of opinion. The use of tracer bullets for the purpose mentioned was a general practice among aviators during the World War and it was defended as a necessary means of effective attack, but in at least one case enemy aviators were arrested and put on trial on the charge that such methods were contrary to the existing rules of the Hague Convention. To remove the doubt regarding the lawfulness of the practice, the commission considered it desirable to adopt a rule on the subject.

The rule as originally proposed simply declared that the use of tracer bullets against aircraft generally was not prohibited. Against this proposal various objections were raised, mainly on the ground of the impracticability of aviators changing, during the course of a flight, the ammunition used by them in aerial machine guns. The commission finally came to the conclusion that the most satisfactory solution of the problem would be a rule declaring specifically that the use of tracer, incendiary or explosive projectiles by, or against, aircraft is not prohibited, and this is the form in which it appears in the proposed code (Art. 18). It is also added that the rule

[17] As to this, see my *International Law and the World War*, Vol. 1, p. 198.

applies equally to states which are parties to the Declaration of St. Petersburg of 1868 and to those which are not.

The question of the right of aviators to drop literature of a propagandist character within the lines of the enemy is dealt with by Article 21, which declares that the use of aircraft for this purpose shall not be regarded as an illegitimate means of warfare and that the members of crews guilty of such acts shall not be deprived of their rights as prisoners of war, if captured. As is well known, aviators of various belligerent countries during the World War resorted to this practice. Quantities of the "holy war" proclaimed against England and France by the Mohammedan Padishah were dropped by German aviators among Indian troops behind the French lines, and many copies of a "lying manifesto" against England and her allies were dropped either by German or Austrian aviators within the Italian lines. In February, 1918, two British aviators who had fallen into the hands of the Germans were sentenced to ten years penal servitude for having dropped "hostile proclamations" (copies of President Wilson's declaration of peace terms) within the German lines. Upon the threat of retaliation by the British Government, the German Government ordered their release. The Austro-Hungarian Government was reported to have given instructions that the death penalty should be inflicted upon captured enemy aviators guilty of distributing enemy proclamations or propagandist literature within the Austro-Hungarian lines.[18] In consequence of these incidents, the Commission of Jurists considered it desirable to formulate a rule on the subject, and the rule proposed recognizes the legitimacy of the acts referred to. It covers not merely the dissemination of tracts, but other means as well, such as the formation of words in the sky by means of trains of smoke, though it probably would not legitimize the dropping of tracts inciting to acts of murder or assassination.

The problem of aerial bombardment was the most important and at the same time the most difficult to solve of all the questions with which the commission had to deal. The practice, at least of certain belligerents, during the World War of making air raids upon cities, towns and villages situated far behind the lines of the operations on land and even in the interior of enemy countries, no part of which had ever been invaded by the land forces, and which were not even defended in the sense of land warfare, and of launching, indiscriminately, bombs and projectiles upon private houses, churches, schools, hospitals, orphanages, and historic monuments, aroused a feeling of horror against which the conscience of mankind everywhere revolted.[19] The vast majority of the victims of these raids were non-

[18] As to these incidents and the sources of information, see my *International Law and the World War*, Vol. 1, p. 495.

[19] As to these raids see my *International Law and the World War*, Vol. I, pp. 459, *et seq.*; Rolland, "*Les Pratiques de la Guerre Aérienne dans le Conflit de 1914 et le Droit des Gens*," *Rev. Gén. de Droit Int. Public*, t. XXIII, pp. 537 *et seq.*; Oppenheim, *International Law*, 3d

combatants and large numbers of them were women and children. Had the amount of military damage done to the enemy been considerable, something might be said in justification of such methods, but in fact in most instances it was trifling and bore little proportion to the damage inflicted upon private property and to the loss of life or injury suffered by the unoffending non-combatant population. In short, the military advantage was only incidental and not sufficient to compensate in any degree for the wrong done to those who were not active participants in the war.[20]

There is good reason to believe that one of the motives, possibly the leading motive, which animated those who were responsible for these attacks was the psychological effect which it was believed that the terrorization of the civilian inhabitants would cause and which might lead them to demand peace. This was frankly admitted by some newspaper editors in Germany.[21] But it may be doubted whether attacks of this kind are ever likely to produce any such effects; on the contrary, their very barbarity is rather more likely to intensify the hatred of the people against whom they are directed and drive them to renewed efforts to overcome an adversary who has recourse to such practices. Inevitably also they lead to reprisals and thus tend to cause the war to degenerate into a struggle of reciprocal barbarism.

On the other hand, the very potency of the airship as an instrument of destruction in war is such that there is no reason to believe that states will ever totally renounce the employment of it as an arm of combat, and restrict its use to services of exploration, observation and communication, as certain members of the *Institut de Droit International* proposed in 1911.[22] Any such proposal must be regarded as purely chimerical.[23] Likewise, the proposal of M. de Lapradelle and others to recognize the legitimacy of "vertical"

ed., Vol. II, p. 301; Merignhac et Lémonon, *Le Droit des Gens et la Guerre de 1914–1918*, Vol. I, pp. 629 *et seq.*, and Clunet, "*De l'Emploi abusif des Aérostats de Guerre par les Allemands*," in his *Journal de Droit International*, 1916, pp. 385 *et seq.* Chronological lists of air raids made by the different belligerents during the World War may be found in the *Text Book of Naval Aeronautics* (New York, 1917), and in the *Text Book of Military Aeronautics* (New York, 1918).

[20] The London *Times* of June 2, 1916, thus summarized the results of 44 air raids over England: Killed, 409; injured, 1005. Of the victims killed, 114 were women, and 73 were children. In March, 1918, the British Government made public a statement in which it was asserted that the number of English non-combatants who had lost their lives in consequence of German air raids over England down to February 13, 1918, was 1284 and the number of injured 3105. New York *Times*, March 14, 1918.

[21] See, for example, an editorial so declaring, in the *Essener Volkszeitung* of March 15, 1918, reproduced in Clunet's *Journal de Droit International*, t. 45, p. 622.

[22] See the opinions of Von Bar, Albéric Rolin, Holland, Fiore, Labra, Strisower and Westlake in the *Annuaire de l'Institut*, t. XXIV (1911), pp. 134–155 and pp. 303–337. Compare also the opinion of M. Beernaert in the *Revue de Droit International et de Législation Comparée*, t. XLIV (1912), pp. 569 *et seq.*, and Stael-Holstein, *La Réglementation de la Guerre des Airs*, p. 59.

[23] Compare Fauchille, "*Le Bombardement Aérien*," *Rev. Gén de Droit Int. Pub.*, t. XXIV, p. 67, and Spaight, *Air Craft in War*, p. 3.

aerial warfare, that is, the right to launch bombs and projectiles from aircraft upon the enemy below, but to forbid "horizontal" attacks, that is, the firing by one aviator upon another in the air, must be ruled out as impracticable.[24] The legitimacy of aircraft not only for purposes of observation and reconnaissance but as an instrumentality for destruction must be recognized, and there is no place for making a distinction between so-called vertical and horizontal warfare. At the same time, the civilized world demands that its use in war shall be restricted, so far as is practicable, to attacks against enemy combatants, including, it must be admitted, those of the civil population who are engaged in the production of materials of war or in other services which relate directly to the prosecution of the war, and to the destruction of such works and establishments as properly fall within the category of military objectives. The problem, therefore, is not the prohibition of aerial warfare, but its regulation in such a manner as to spare, so far as is practicable, unoffending non-combatants, private property and public institutions from indiscriminate destruction, and to insure that the wars of the future will not degenerate into struggles of reciprocal reprisals and barbarism, in which no distinction will be made between combatants and non-combatants or between public property and private property.

On account of the very nature of aerial warfare, the solution bristles with difficulties, and no regulations which can be agreed upon, even if they are scrupulously observed by belligerents, are likely to be entirely effective in safeguarding the rights of non-combatants and private property in all cases. The civilized world is in accord that a belligerent ought not to direct his attacks against the civil population who take no part directly or indirectly in the operations of the war, or against private property or institutions of a charitable, educational or religious character, and all the existing conventional and customary rules of land warfare are based on this principle. There is no reason for admitting a different principle for aerial warfare, and however much the old distinction between the situation of the military and civil populations in respect to blockade, contraband, commercial intercourse, etc., may have been undermined during the World War, there is no reason to assume that the world is ready to go to the length of totally abandoning it and of recognizing the legitimacy of war directed against both classes of the population equally. It may readily be admitted, as some militarists now prophesy will be the case, that in the wars of the future the category of non-combatants will be very greatly reduced, that women who work in munitions factories and in other ways contribute toward the winning of the war, cannot expect to enjoy the immunities of non-combatants, and that even those who take no part at all in the war, directly or indirectly,

[24] *Annuaire de l'Institut*, t. XXIV (1911), p. 336. As to the impracticability and doubtful value of this proposed distinction, see the remarks of M. Fauchille, article cited, p. 67, and Sperl, in the *Rev. Gén. de Droit Int. Pub.*, t. XVIII, p. 480.

will be obliged to "accept their share of the inhumanity." [25] But it does not follow from these circumstances that the ancient distinction should be abandoned. The distinction is fundamental and eternal; it is founded upon considerations of humanity; and it would be a singular conception of humanity to abandon it merely because conditions have changed, and especially because more powerful instruments of destruction have been invented, by the use of which the immediate interests of belligerents may be better subserved.

The public opinion of the world demands that whatever rules are adopted, they shall respect so far as is practicable this fundamental distinction. At the same time, they must allow belligerents to employ aircraft for the purpose of attacking the persons and of destroying the things that have always been regarded as legitimate objects of attack in war. The problem cannot be solved satisfactorily, in our opinion, by attempting to assimilate completely aerial warfare either to land warfare or naval warfare, or both, or by treating aerial warfare as though it were merely an accessory of one or the other and by applying to its conduct either the laws of land warfare or naval warfare, as some jurists have proposed to do.[26] Aerial warfare differs essentially from both land and naval warfare and it is carried on in large measure independently of both. It must therefore be regulated by a different set of rules,[27] although naturally many of the rules of land warfare and naval warfare are applicable to its conduct or may be adapted so as to be made applicable. The Commission of Jurists proceeded according to this view. Instead of endeavoring to adapt and apply the rules of land and naval warfare to the conduct of aerial warfare, it undertook to formulate a distinct code, although it appropriated literally or in adapted form various rules of the Hague and Geneva Conventions which seemed suitable of application to the conduct of aerial warfare. The commission also very properly recognized at the outset, that whatever rules were adopted they ought to begin with a definite and precise statement of certain objects for which bombardments by air should not be recognized as legitimate, and no difficulty was experienced in reaching an agreement as to what these purposes were. In the first place, it was agreed that aerial bombardment for the purpose of terrorizing the civil population, of destroying or damaging private property not of military character, or of injuring non-combatants,

[25] Compare to this effect the remarks of Rear Admiral S. S. Hall, of the British Navy, in an address before the Grotius Society, *Transactions*, Vol. V, p. 83, and of Professor A. M. Low, in the *Nineteenth Century*, Sept. 1923, p. 356.

[26] For example, Merignhac, *Traité de Droit International*, t. I, pp. 309 *et seq.* See also his article, "*Le Domaine Aérien*," *Rev. Gén. de Droit Int. Pub.*, t. XXI, pp. 228 *et seq.;* and Rolland, "*Les Pratiques de la Guerre Aérienne dans le Conflit de 1914*," *ibid.*, t. XXIII, p. 511.

[27] Compare Spaight, *Air Craft in War*, pp. 99 *et seq.;* Hobza, *Compte rendu de la V*ème *Congrès du Comité juridique international de l'Aviation*, p. 223; Fauchille, *Droit International Public* (8th ed.) no. 1440; and Pillet, *Annuaire de l'Institut de Droit International*, 1911, p. 306.

should be prohibited.[28] This was a formal condemnation of the practices of the World War, and if it becomes a binding rule and is scrupulously observed by belligerents in future wars, aerial warfare will lose much of the character which evoked just protest during the late war and which has aroused widespread apprehension as to its frightfulness in the future. In the second place, the commission agreed that aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money should likewise be prohibited (Art. 23). The rule proposed differs from that of the Naval Bombardment Convention of 1907 which allows the bombardment of undefended places for the refusal of the local authorities to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force in question, although it prohibits bombardments for failure to pay money contributions (Arts. 3 and 4). It does not appear from the report of the commission why a different rule was adopted in the case of aerial bombardment. But it is not easy to see how the processes of levying requisitions and contributions could be carried out by an aviator, and if so, how they could be delivered. To admit the right of bombardment in such cases would probably afford an excuse for the bombing of any place which an aviator might wish to attack. The prohibition, therefore, was a proper one.

Having stated the purposes for which aerial bombardment is *not* recognized as legitimate, the rules proposed by the commission proceed to define what it considers to be legitimate bombardment. Article 24 declares aerial bombardment to be legitimate only when it is directed at a "military objective", that is, an object the destruction or injury of which would constitute a "distinct military advantage" to the belligerent having recourse to it. The sole objectives which may be bombarded are the following: military forces, military works, military establishments or depots, factories constituting important and well-known centers engaged in the manufacture of arms, munitions or distinctively military supplies, and lines of communication or transportation used for military purposes. Furthermore, it is declared that bombardment of these objects is legitimate only when it is directed "exclusively" against them. It will be noted that the *persons* who may be bombarded are "military forces". Apparently this category would not include civilians engaged in the manufacture of munitions, although, as Rolland remarks, they are almost in the same situation as men engaged in the auxiliary services of the army.[29] There would seem to be no reason,

[28] Article 22. Air bombardment for the purpose of terrorization is condemned by nearly all writers on the laws of war. Compare to this effect the observations of Herbert Manisty, *Transactions of the Grotius Society*, Vol. VII, p. 33: "In my opinion the principal object of a convention or rules, whatever they may be, for the regulation of aerial war, should be to prevent and render illegal bombardment by aircraft of cities or places inhabited by civilians, when this bombardment has as its sole object the terrorization of the civil population, and by this means, the weakening of the morale of the entire community."

[29] "*Les Pratiques de la Guerre Aérienne*," *loc. cit.*, p. 554.

therefore, why they should be entitled to the immunities of non-combatants. However, the munitions factories or other establishments in which they work may be bombarded, so that in fact the immunity covers them only while they are in their homes.[30] The list of objectives which may be bombarded is essentially the same as that proposed by M. Fauchille in 1917, except that it does not include edifices utilized by the enemy government or its representatives for civil governmental purposes.[31] In our opinion the omission of such buildings from the list of military objectives is proper. Those especially which have been constructed in time of peace as the permanent seat of government ought not to be considered as liable to bombardment.[32] Agreement upon the list of military objectives was reached only after long discussion by the members of the commission, some of whom desired to make it more comprehensive.

It will be noted that the criterion adopted is whether the object is one the destruction or injury of which would constitute a "distinct military advantage" to the attacking belligerent. It is a reasonably sound one and it has the approval of jurists who have considered the matter.[33] The chief defect, however, of this or any rule which undertakes to restrict aerial bombardment to specified objects when they are situated in urban "agglomerations" and are immediately surrounded by other objects which it is forbidden to bombard, lies in the obvious difficulty which aviators will experience in confining their bomb-dropping "exclusively" to such objects.

How, it may well be asked, can an aviator who flies over a city at great height during the night, when all lights are extinguished, as was the general practice during the World War, identify the persons and things which he is permitted to bombard? How can he distinguish between the military forces and the civil population; between military works, depots and factories engaged in the manufacture of arms and munitions or used for military purposes, and other establishments engaged in the manufacture or production of articles used for civil purposes; or between railway lines used for military purposes and those which are not? To require aviators to single out the one class of persons and things from the other and to confine their attacks "exclusively" to one of them will in many cases be tantamount to an absolute prohibition of all bombardment.

[30] Merignhac and Lémonon (*op. cit.*, Vol. I, pp. 676–7) approve the distinction between the rights of munitions workers when they are actively engaged in the manufacture of munitions and when they are in their homes, since in the latter case "they are in no way different from the ordinary population." It may be doubted, however, whether the distinction is sound.

[31] See his article, "*Le Bombardement Aérien*," *loc. cit.*, p. 70.

[32] Compare to this effect Manisty, "Aerial Warfare and the Law of War," *Grotius Society Transactions*, Vol. VII, p. 34.

[33] Compare Hyde, *op. cit.*, Vol. II, p. 322, and Wilson, *Suggested code of aerial warfare*, Naval War College, April 6, 1920, Art. 28.

The most striking feature of the rule proposed by the commission is the character of the test which it adopts for determining the liability of towns and cities to bombardment. It will be noted that the test adopted is not whether they are "defended," but whether they contain establishments and buildings which have the character of military objectives. In fact, the terms "defended" and "undefended" are nowhere mentioned in the proposed code. In this respect the rule regarding aerial bombardment differs from the rule of the Hague Conventions relative to land bombardment (Art. 25), and naval bombardment (Art. 1), which forbid the bombardment of "undefended" places, but which allow the bombardment of those which are "defended". In our opinion, the test proposed by the commission is in principle just and logical. The distinction between "defended" and "undefended" places as a test of liability to bombardment is reasonable enough in land and naval warfare, but when applied to aerial bombardment it is illogical and even absurd. As M. Fauchille has pointed out, the purposes of aerial bombardment are different from those of land and naval bombardment. The object of the latter is to compel the place against which it is directed to surrender so that the bombarding belligerent may take possession of and occupy it. The purpose of aerial bombardment, on the other hand, is simply to destroy the place or certain persons or things in it.[34] An aviator cannot capture and occupy a town as land or naval forces can. Moreover, before commencing a land or naval bombardment, the attacking belligerent will ordinarily summon it to surrender, thereby offering the inhabitants an opportunity to escape the consequences of bombardment if they wish. That is to say, they are given the choice of submitting to bombardment or of surrendering and avoiding the consequences. Aviators, on the other hand, rarely offer the inhabitants such an opportunity; in many cases, especially during night raids, it would be impracticable to communicate a summons to surrender, and in any event, it is doubtful whether the refusal of a populous city to surrender upon the demand of a single aviator should be admitted as a justifiable excuse for bombing it. Finally, the "defense" test is neither reasonable nor logical. The existence in or around a city of fortifications, ramparts, or other means of defense against land or naval bombardment cannot be properly considered as giving it the character of a "defended" place in the sense of aerial bombardment. It is believed that no town or city can justly be regarded as "defended" in the sense of aerial bombardment unless it is equipped with artillery of vertical range especially constructed for bringing down attacking aircraft [35] or unless it is defended by a squadron of protecting aircraft. If therefore the defense test, which is applied in land and naval warfare, should be adopted as the criterion for determining the liability of cities and towns to bombardment by aircraft, the terms "defended" and "undefended" should be more precisely defined and

[34] Fauchille, *Le Bombardement Aérien*, *loc. cit.*, p. 69.

[35] Compare Hazletine, *Law of the Air*, p. 469.

certainly they should be interpreted in a different sense to that which is given them in land and naval warfare.

As M. Pillet has pointed out, the terms are unsatisfactory, as was abundantly demonstrated by the experience of the World War.[36] To take a specific example, it was impossible to say whether Rheims and Soissons were "defended" or not when they were bombarded by the Germans. The international Red Cross Committee in a letter of November 22, 1920, addressed to the Assembly of the League of Nations demanding that aerial bombardment be prohibited, pointed out that there was no satisfactory criterion for distinguishing between open or undefended towns and those which were not.[37] In any case, if the test of defense were adopted, it is not easy to see how an aviator in many cases could determine before beginning a bombardment whether a particular place is defended or not. In view of these circumstances, the solution proposed by the Commission of Jurists which abandons absolutely the criterion of "defense" and substitutes that of the "military objective" is not only more practical but more logical and reasonable.[38] In fact, during the World War the British and French Governments professed to have acted in accordance with this rule. Their aviators were instructed to confine their attacks to "points of military importance" and the reports and *communiqués* of air raids which were given out to the public uniformly asserted that the objects of attack were railway stations, barracks, munitions factories, hangars, chemical establishments, etc. Whether the town or city in which they were situated was defended or open, was not mentioned, that fact apparently being regarded as immaterial.[39] It should be said, however, that during the later years of the war, both English and French aviators were authorized to make raids upon certain "undefended" towns of Germany as acts of reprisal for repeated and indiscriminate attacks of German aviators against similar places in England and France.[40] Theoretically the Germans also adopted the "military objective" doctrine, although their practice was far from being consistent with it. Their *communiqués* and explanations as late as the spring of 1918 uniformly declared that their air attacks had hitherto been directed exclusively against fortresses or other objects of military importance and then only when they were situated in the zone of field operations. The raids upon England and the portions of France outside the zone of land operations were justified as legitimate acts of reprisal either for the earlier allied raids upon Karlsruhe, Freiburg and Stuttgart, or for the enforcement of the "illegal and inhuman" Anglo-French blockade.

[36] "*La Guerre Actuelle et le Droit des Gens*," *Rev. Gén. de Droit Int. Pub.*, t. XXIII, p. 429.

[37] *Revue Internationale de la Croix Rouge*, 1920, p. 1348.

[38] Compare to this effect the opinion of Spaight, "Air Bombardment", *British Year Book of International Law*, 1923–24, p. 22.

[39] Compare Spaight, *ibid.*, p. 24.

[40] As to these reprisal raids, see my *International Law and the World War*, Vol. I, pp. 488 *et seq.*

Whatever may have been the actual practice of the three belligerents mentioned, it is clear that there was a disposition among them to regard the "military objective" test as the sounder and more defensible; that only objects of military importance ought to be bombarded, and that whether they were situated in a "defended" or "undefended" city or town was immaterial. The rule proposed by the Commission of Jurists embodies, therefore, the view professed by the belligerents during the World War, even if their practice was not in conformity with it.

A second outstanding feature of the rules proposed by the Commission of Jurists is the distinction which it makes between the bombardment of cities, towns, villages, dwellings and buildings situated in the "immediate neighborhood of the operations of the land forces" and those situated outside this region. The bombardment of those situated in the latter zone is prohibited. But suppose certain of the "military objectives" mentioned above are found in the latter zone? Clearly, no belligerent could be asked to renounce his right to bombard such objects, wherever they may be found, and the rule proposed by the commission does not go to such lengths. While it prohibits the bombardment of the town or city in which they are situated, it allows the bombardment of the "military objective" itself, provided it is so situated that it can be bombarded without the indiscriminate bombardment of the civilian population. If it is not so situated, the aviator must abstain from bombardment. This rule is somewhat similar to that which had already been proposed by M. Rolland in 1916, namely, that only such aerial bombardments should be regarded illegitimate and condemnable, as, in view of the circumstances in which they are made, may affect (*atteindre*) principally or exclusively the civil population not engaged in the production of military supplies. That is to say, the bombardment of military objectives situated in an urban agglomeration is legitimate when there exist reasonable chances of hitting them; on the other hand, if there is a probability that the civil population will be the principal victims, the bombardment is not justifiable.[41]

In the other zone—that which constitutes the immediate *voisinage* of the theater of land operations—not only the "military objectives" which may be found there, but even the cities, towns or villages in which they are situated, including also dwellings and buildings, may likewise be bombarded, provided there exists a "reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population". The underlying principle of this rule is that whatever injuries the civil population may be subjected to, they should be merely incidental or accessory and the military damage must be compensatory, that is, sufficiently great to justify the sufferings caused those who are not legitimate objects of attack.[42] It will

[41] Article cited, p. 553.

[42] Compare the observations of Spaight, *Air Craft in War*, p. 6, and Hyde, *op. cit.*, Vol. II, p. 322.

be noted that in neither zone is bombardment totally forbidden, nor in either is it allowed without restriction. The principal difference is that in one a larger right of bombardment is permitted than is allowed in the other. The distinction is founded on considerations of both reason and logic, not to say humanity. Throughout the World War the Allies protested vigorously against the German air raids upon their towns and cities situated far behind the lines of land operations, and, as stated above, the public opinion of a large part of the civilized world strongly condemned them as cruel and barbarous. The German Government itself protested against the attacks of Allied aviators upon German towns, not merely for the reason that they were "undefended", but because they were situated "far from the theater of operations" or "outside the region of operations". Unfortunately, however, the Germans gave the zone theory an interpretation the effect of which would have protected Karlsruhe and Freiburg against bombardment but not the towns of England and France.[43]

The distinction which the proposed rules of the commission make between the two zones for purposes of bombardment is founded on the difference of situation between the places and populations of the two regions—a difference which every one feels and can appreciate. In and immediately adjacent to the zone of land operations, war and violence reign; the destruction of towns and villages in this area may generally be justified as a legitimate part of the field operations, and being aware of this, the civil population can be on their guard and may avoid the consequences by withdrawing in advance of the arrival of the enemy. In fact, usually they will already have evacuated this region voluntarily or by order of the local commander of their own forces, so that they will no longer be exposed to the consequences of bombardment. In the other region outside the zone of operations their situation is totally different. A state of actual war can hardly be said to exist there. For an aviator to fly over this region in the darkness of night, launch his bombs indiscriminately upon peaceful towns and villages which are not even technically defended and kill unoffending women and children, is as indefensible as the torpedoing, without warning, of a merchant vessel filled with non-combatants—a procedure which a recent convention stigmatizes as piracy.[44]

The distinction which the rule proposed by the commission makes between the right of aerial bombardment in the two zones, therefore undoubtedly responds to a widespread popular demand.[45]

[43] Compare Rolland, article cited, p. 553, and Spaight, article cited, p. 25.

[44] Treaty of Washington of February 6, 1922, Art. 3.

[45] Compare, however, Ellis, "Aerial-Land and Aerial-Maritime Warfare", this JOURNAL, Vol. VIII, p. 267, who thinks that the proposal to confine aerial warfare to the sphere above the zone of belligerent operations will probably never be accepted. Military interests, he thinks, will outweigh humanitarian considerations and the entire territory of belligerent countries will be the theater of combat. The rule proposed by the commission, however, is not inconsistent with this view, since it does not forbid but only restricts aerial bombardment in the zone lying outside the field of land operations. All will agree with Oppenheim

But in limiting aviators to the bombardment of certain specified military objectives, in forbidding the bombardment of those situated outside the theater of land operations when it cannot be done without the indiscriminate bombardment of the civilian population, and in allowing the bombardment of places within the latter zone only when there exists a reasonable presumption that the military concentration is sufficiently important to justify bombardment, the rules proposed by the commission undoubtedly leave a large discretionary power to aviators. To a much larger degree than in land and naval warfare they are made the judges of the legitimacy of their attacks. They must determine in each case and with little opportunity for investigation and verification whether a particular object falls within the category of "military objectives", and if so whether it is situated outside the immediate zone of land operations, and if so whether it can be bombarded without "indiscriminate" bombardment of the civil population; and, finally, whether in the case of a city, town or building situated within the zone of land operations there exists the "reasonable presumption" of military importance required by the rule. Manifestly, the most scrupulous aviator will commit errors of judgment under these circumstances if he resorts to bombardment at all. It is altogether probable that in the majority of cases aviators will take large chances, that they will interpret broadly their rights and consider whatever damage may result to the civil population from their bombarding operations as being merely incidental to the accomplishment of a military advantage, and therefore justifiable. For this reason the rules proposed may not prove to be a very effective limitation upon their conduct. The commission was not indifferent to the possibility that the rules which it proposed would be violated and therefore of the necessity of a sanction, and, accordingly, following the analogy of Article 3 of the Hague Convention of 1907 Respecting the Laws and Customs of War on Land, it adopted a rule which makes belligerents liable to the payment of an indemnity for injuries to persons and property resulting from violations of the provisions regarding bombardment.[46]

It is difficult to see how any rule could be devised which would allow

(*International Law*, 3d ed., Vol. II, p. 302) that "the limits in which aircraft may be employed to make raids outside the theater of military or naval operations should be established".

[46] Several of the projects laid before the commission proposed to establish the personal responsibility of aviators who were guilty of violating the rules and to subject them to punishment as war criminals. But no such rule was adopted. The commission, however, admits in its report that the absence of such a rule will not prevent the punishment of aviators who are guilty of infractions against the laws of aerial warfare. The Dutch delegation proposed that belligerents should be held responsible for all acts in violation of the rules, committed by aviators in their service, and that in case of differences regarding responsibility for such violations, they should be submitted to the Permanent Court of International Justice. While declining to embody the proposal in a rule, the commission incorporated the suggestion in its report in order to bring it to the attention of the governments concerned.

bombardment at all and yet be entirely free of the objection mentioned. In the last analysis, the value of the rule proposed by the commission must depend upon the good faith, the respect for conventions and the sentiment of humanity which may animate attacking aviators. It results from the very nature of aerial warfare that under any rule that may be adopted, except that of absolute prohibition, non-combatants will be exposed to large risks and in many cases to the loss of their immunities.[47] In many cases, no doubt, the fear of reprisals will deter aviators from deliberately violating the rules, for it may be assumed that the belligerent whose own civil population will be equally exposed to unlawful attacks by enemy aircraft will hesitate to have recourse to forbidden methods which may be turned against him with equal effect.[48]

Following the analogy of the Hague Conventions,[49] the commission added a rule enjoining aviators to spare as far as possible properly marked buildings dedicated to public worship, art, science and charity, and historic monuments and hospitals, provided they are not used at the same time for military purposes (Art. 25). Upon the insistence of the delegates from Italy, a country whose historic and artistic monuments suffered heavily from the effects of aerial bombardment during the World War, a series of special rules were agreed upon with a view to providing greater protection for this class of monuments. In brief, these rules permit states to establish, if they see fit, a zone of protection, not exceeding 500 metres in width, around such monuments, provided it is done in time of peace [50] and duly notified to the other Powers, and provided they are properly marked by clearly visible signs. An inspection committee of three neutral representatives is provided for the purpose of insuring that the zones so established and the monuments situated therein are not used for military purposes (Art. 26). The system is entirely optional, and if a state prefers to rely wholly upon Article 25 for the protection of such monuments, it is free to do so. It may be remarked that the establishment of such zones will have the effect in certain cases—for example in the case of Venice and Florence, both of which cities are particularly rich in historic and artistic monuments—of including the larger part of the cities in which they are situated, since the zones will frequently overlap one another. On the other hand, the effect will be to neutralize such cities so that they cannot be used for military purposes by the belligerent in whose territory they are situated—a rule which no doubt will be strictly interpreted by the enemy.

[47] Compare the observations of Rolland, article cited, p. 555; Spaight, *Air Craft in War*, p. 21; Fauchille, article cited, p. 75; Hyde, *op. cit.*, Vol. II, pp. 321 and 323; and Ellis, article cited, p. 267.

[48] Compare Spaight, *Air Craft in War*, p. 22.

[49] Convention Respecting the Laws and Customs of War on Land, Art. 27; Convention Respecting Bombardment by Naval Forces, Art. 5.

[50] There was some objection to the requirement that the zones must be established and notified only in time of peace.

Various other questions of aerial warfare are regulated by the rules proposed by the commission. None of them, however, rank in importance with that of bombardment. Among such matters may be mentioned: espionage, the requisition of neutral aircraft, confiscation of enemy aircraft, treatment of crews and passengers of captured enemy aircraft, internment by neutrals of belligerent aircraft (with their crews and passengers), landing upon neutral territory; visit, search, and capture; destruction of neutral aircraft, adjudication by prize courts, and the reciprocal rights and duties of belligerents and neutrals in their relations with one another. For the solution of most of these questions the Hague rules for the regulation of the same questions in land and naval warfare are quite sufficient and they were taken over bodily or with adaptations and embodied in the proposed code of aerial war.

The most important of these questions perhaps was whether belligerent aircraft should be allowed to circulate over the territory and territorial waters of neutral states with or without the permission of these latter states. The question was discussed by jurists before the World War but they were not entirely in accord on the question. M. Fauchille, in his report to the Institute of International Law in 1911, had maintained that it was not a violation of neutrality for belligerent aircraft to circulate over the territory of neutral states with their permission, provided it was in the nature of simple inoffensive passage. Nevertheless, he recognized the right of neutral governments to forbid such circulation, subject to the condition that both or all belligerents were treated alike.[51] M. Fauchille evidently looked with favor on the right of innocent passage for belligerent aircraft, for the reason that if it were denied it would have the effect of preventing certain states from employing aircraft for the purpose of attacking the enemy. This would be the situation, for example, of France and Austria (a state without sea-board) in case of war between them, if Italy, Switzerland and Germany were neutral. Other writers, however, adopted the view that it was the duty of neutrals to forbid such passage and to use all means at their disposal to prevent it. They assimilated the aerial space to the land upon which it abuts and applied to its use the laws of neutrality which govern the conduct of land warfare.[52] They pointed out that if the right of passage were

[51] *Annuaire de l'Institut*, t. XXIV, pp. 60 *et seq.* M. Hooghes proposed code was based on the same principle (Art. I). Other writers who adopted this view were Catellani, *Le Droit Aérien*, p. 188; Meyer, *Die Luftschiffahrt*, pp. 18–20, also his article in the *Revue Juridique Internationale de la Locomotion Aérienne*, 1912, p. 192, and Philit, *La Guerre Aérienne*, pp. 38–48. Ellis (article cited, p. 266), appears to have adopted the same view. He adds that neutral governments ought to announce by proclamation at the outbreak of war their intention, and in case they fail to do so, belligerents would be justified in interpreting their silence as sanctioning the right of passage.

[52] Among those who maintained this view were: Bellenger, *La Guerre Aérienne*, pp. 104 *et seq.*; Grovalet, *La Navigation Aérienne devant le Droit International*, p. 77; Hazletine, *Law of the Air*, p. 139; Lycklama à Nijeholt, *Air Sovereignty*, p. 67; Le Moyne, *Le Droit*

allowed equally to the aircraft of both or all belligerents they would meet in the course of their flights over neutral territory and would almost certainly attack one another. In that case the inhabitants below would be exposed to danger from falling bombs, projectiles and disabled airships.[53] Throughout the World War neutral governments in fact acted in accordance with this view. At the very outset, Denmark, Norway, Sweden, Spain, Italy, the Netherlands, and others formally prohibited the passage of belligerent aircraft, military and non-military alike, over their territory, and belligerents were warned that all means at their disposal would be employed to prevent such circulation.[54] Some of them, like Switzerland, Denmark and the Netherlands, instructed their military authorities to fire upon aircraft offending against their orders, and in some instances they did so with success. Belligerents generally acquiesced in these prohibitions and entered no protests against them.[55] In fact, both the German and British Governments gave orders to their aviators to respect the neutrality of neutral countries and to refrain from flying over their territories, and when their orders were violated by mistake or otherwise, regrets were expressed, and where damage was done indemnities were paid. This general practice of neutral governments and the acquiescence of belligerents therein, established a customary rule,[56] and the Commission of Jurists embodied it in the code which it proposed. Article 12 declares that, in time of war, any state, whether belligerent or neutral, may forbid or regulate the entrance movement or sojourn of aircraft within its jurisdiction.[57] This article, standing alone, would allow neutrals to permit the circulation of belligerent aircraft over their territory, if they wished to accord it, but the right is negatived by Articles 40 and 42. Article 40 forbids belligerent military aircraft from entering the jurisdiction of a neutral state, and Article 42 obliges neutral

Futur de la Guerre Aérienne, p. 226; Merignhac, *Traité de Droit International*, t. I, p. 544; Rolland, article cited, p. 548; Spaight, *Air Craft in War*, p. 66; Kaufmann, *Annuaire de l'Institut*, t. XXIV, p. 139, and the project of the code of maritime neutrality of the American Institute of International Law (Art. 20).

[53] Compare Rolland, article cited, p. 579, and Spaight, *op. cit.*, p. 66.

[54] A résumé of these prohibitions and the protests of neutral governments against the violations thereof may be found in Spaight, *Air Craft in Peace and the Law*, app. III, pp. 203 *et seq.* See also my *International Law and the World War*, Vol. I, pp. 473 *et seq.*

[55] The German Government, however, protested against the action of the Dutch authorities in firing upon their dirigible, L. 19, which, it alleged, was in the act of landing in consequence of *force majeure*, but the action of the Dutch was defended by Rolland (article cited, p. 581), and Spaight (*op. cit.*, p. 9).

[56] Compare Rolland, article cited, p. 577.

[57] The International Air Convention of 1919 (Art. 3) had already affirmed the right of states, for military reasons or in the interest of the public safety, to prohibit the aircraft of other states from flying over certain areas of their territory. This qualified right of prohibition becomes absolute in time of war, in consequence of Article 38, which declares that in case of war the provisions of the said convention do not affect the freedom of action of the contracting parties, either as belligerents or as neutrals.

governments to use the means at their disposal to prevent such entry.[58] Clearly, therefore, it will not be within the right of a neutral government to accord the privilege of even innocent passage to belligerent military aircraft through the aerial space above its territory, should the proposed rule be accepted as a rule of international law. The prohibition, however, applies only to *military* aircraft, and not to non-military aircraft of belligerent nationality, either public or private.

But suppose a military airship of belligerent nationality is compelled through *force majeure*, lack of gasoline or motor trouble to land in neutral territory? There were instances of the kind during the World War. In that case what treatment shall the aviator, his craft and its crew be entitled to receive from the local authorities? This question had been discussed before the World War and certain jurists had proposed to solve the question by applying the rule of the Hague Convention (No. 13, Arts. 12–14), Relative to the Rights and Duties of Neutral Powers in Maritime War, which permits a belligerent warship which has been driven into a neutral port by stress of weather or by the necessity of making repairs, to remain there until the cause of its entry has ceased.[59] Others, however, assimilating aviators to troops in land warfare who take refuge from pursuit, in neutral territory, proposed to apply the rules of the Hague Convention (No. V) Respecting Land Warfare and require that their aircraft be sequestrated and the crews interned.[60] This rule was adopted by the Commission of Jurists, Article 42 of whose proposed code, as stated above, makes it the duty of neutral governments to use the means at their disposal to intern any belligerent military aircraft which is within its jurisdiction, after having alighted *for any reason whatever*, together with its crew and the passengers, if any. It will be noted that the rule makes no distinction between aircraft which have voluntarily entered the jurisdiction of a neutral state and landed therein, and those which have been driven to land as a result of bad weather or defective motors or which may have landed through mistake.[61] In either case the aircraft with its *personnel* must be interned. This rule, it may be remarked, is in

[58] There is no doubt that an airship which passes through the air space above a neutral state would be "entering its jurisdiction." This was settled by Article 1 of the International Air Convention of 1919 which recognizes that every state has "complete and exclusive sovereignty in the air space above its territory and territorial waters". The "jurisdiction" of a state necessarily extends everywhere it has an admitted right of sovereignty.

[59] Among those who proposed this solution were M. Fauchille, *Annuaire de l'Institut*, t. XXIV, p. 33, and his *Traité*, no. 1476[17]; M. Bellenger, *op. cit.*, p. 110; M. Guibé, *Essai sur la Navigation Aérienne*, p. 290, and M. Philit, *op. cit.*, p. 46.

[60] This rule was advocated by MM. Merignhac, *Traité*, t. I, p. 584; Catellani, *op. cit.*, p. 188; Grovalet, *op. cit.*, p. 78; Le Moyne, *op. cit.*, p. 227; Spaight, *Air Craft in War*, pp. 69 and 118; Rolland, article cited, p. 585; Ellis, article cited, p. 266, and apparently Hazletine, *op. cit.*, p. 140.

[61] Fauchille recognized the justice of such a distinction. See his *Traité de Droit Int. Pub., Guerre et Neutralité* (1921), p. 767.

accord with the practice of neutral governments during the World War.[62]

What treatment shall be accorded belligerent aviators who are forced to land in the territorial waters of neutral states and are rescued by the authorities thereof? There were instances of the kind during the World War and the practice of neutral governments regarding their treatment was not uniform. The Government of Denmark applied the rule of the Hague Convention of 1907 (No. X, Art. 15) relative to shipwrecked seamen, interned them and sequestrated their aircraft. The Norwegian authorities, on the other hand, released them. Of the two procedures, that of Denmark was undoubtedly more in accord with the generally recognized principles of neutrality. The proposed code of the Commission of Jurists apparently does not lay down a complete rule covering such cases. The rule which it adopts provides that the *personnel* of belligerent military aircraft rescued *outside* neutral territorial waters and brought into the jurisdiction of a neutral state by a neutral military aircraft and there landed, shall be interned,[63] but it says nothing of the treatment to be accorded those who are rescued *within* neutral waters. Apparently, however, Article 42, which requires the internment of any belligerent military aircraft found within the jurisdiction of a neutral state, whatever may be the reason for its presence there, was intended to cover such cases. Some important cases of the kind occurred during the World War. Several British sea-planes having been forced to descend in the North Sea, they with their crews were rescued and brought within the jurisdiction of the Netherlands. The Dutch Government released the *équipage* but declined to hand over the *matériel*, on the ground that it would be incompatible with the duties of neutrality laid down by Article 6 of the thirteenth Hague Convention of 1907 which prohibits the supplying directly or indirectly by a neutral to a belligerent of war materials. The action of the Dutch Government in refusing to release the *matériel* rescued from the British planes was the subject of protest by the British Government, which took the position that the prohibition laid down by Article 6 had reference only to the furnishing of supplies *owned* by neutrals and not at all to property *rescued* by them from a belligerent wreck.[64] In another case where a German airship in distress had been

[62] As to that practice see Rolland, article cited, pp. 582, 584; Fauchille, *op. cit.*, pp. 768–769; my work cited, Vol. I, pp. 474 *et seq.*, and Spaight, *Air Craft in Peace and the Law*, pp. 209 *et seq.* (where one will find a list of belligerent airships which were interned in Denmark, Norway, Roumania, the Netherlands and Switzerland).

[63] Article 43. Apparently if they are rescued and brought in by *non-military* aircraft they are not liable to internment. The Dutch authorities during the World War made this distinction, that is, they interned ship-wrecked aviators who were rescued and brought in by *warships* but released those who were brought in by *merchant* vessels. *Netherlands Orange Book*, Sept. 1916, pp. 144–146, and Fauchille, *op. cit.*, p. 769.

[64] See the *Journal of the Society of Comparative Legislation and International Law*, No. XL (April 1918), p. 153.

rescued in the open sea and brought with its crew into Dutch jurisdiction, the crew was released but the airship was sequestrated and retained until the end of the war. Other instances of the kind occurred.[65] Under the rule proposed by the Commission of Jurists, it will be the duty of neutral governments in such cases to intern the crews as well as their disabled aircraft.

One final question remains to be considered, namely, whether neutral aircraft shall be allowed to circulate over the territory of belligerent states. Among the jurists who considered the question before the outbreak of the World War, there was a difference of opinion. Some favored the rule of absolute prohibition;[66] others proposed to leave the whole matter to the decision of the belligerents concerned, that is, they should be left free to permit or forbid such circulation as they might see fit.[67] In fact, throughout the World War, all the belligerents acted in accordance with this view. At the very outset all of them closed their aerial domains to the entry of and circulation of foreign aircraft, and certain neutral governments (for example, that of Switzerland) expressly forbade their nationals from flying over the territory of belligerent states and even from circulating in their own jurisdiction within certain regions near the frontier of belligerent countries. The right of states to exclude foreign aircraft from circulating over their territory, both in time of peace and in time of war, was affirmed in no uncertain terms by the International Air Convention of 1919,[68] and this principle is embodied in the proposed code of the Commission of Jurists.[69] The question may therefore be regarded as definitely settled.

The proposed code elaborated by the commission deals with a variety of other questions of aerial warfare, but the limits of this article do not permit of their consideration. In fact, the commission attempted to find a solution and provide a rule for every question that has so far arisen in aerial warfare, and indeed for a good many that have not actually arisen. In some cases it has proposed rules the necessity and practicability of which, at least in the present state of development of aerial navigation, would seem doubtful.[70]

[65] As to these incidents, see Fauchille, *op. cit.*, pp. 769–70.

[66] For example, Fauchille, *Annuaire de l'Institut*, t. XXIV, pp. 92, 94 and 118; also his *Traité*, p. 774; Rolland, Meurer, and Albéric Rolin, *ibid.*, pp. 92, 138 and 148; Le Moyne, *op. cit.*, p. 29; Philit, *op. cit.*, p. 48 and Spaight, *Air Craft in War*, p. 70.

[67] Among the advocates of this solution were Von Bar, Kaufmann and Renault (*Annuaire de l'Institut*, t. XXIV, pp. 134, 139, 146); Bellenger (*op. cit.*, p. 491); Merignhac, (*op. cit.*, p. 546); and Rolland (article cited, p. 491).

[68] See especially Articles 3 and 38.

[69] Article 12. Compare also Article 30.

[70] For example, it lays down rules governing the visit, search and capture of aircraft, requiring captured aircraft to proceed to a convenient and accessible place for examination, requiring captors to make suitable provision for the safety of persons on board before destroying aircraft, the delivery of contraband found on board neutral aircraft, etc. It is difficult to see how some of these operations can be carried out and, therefore, the necessity of rules governing their procedure.

In its comprehensiveness and detail the proposed code is distinguished from all previous projects which have been formulated by jurists or societies.

In abandoning the illogical distinction between "defended" and "undefended" places as the criterion of the liability to or immunity from aerial bombardment of towns, cities and villages and, by introducing, on the other hand, a distinction between regions which constitute the immediate neighborhood of land operations and those which do not, for the purpose of aerial bombardment, the rules proposed by the commission represent a notable advance upon the existing conventional rules as well as upon those which are found in the projects which have been elaborated by others in the past. Some of the rules proposed by the commission will be criticized for the large discretionary power which they leave to aviators. But, as stated above, it is difficult to see how any rules could be devised which would be entirely free of this objection, if the use of aircraft for purposes of bombardment is permitted at all. The commission made an earnest endeavor to reconcile in a just manner the legitimate rights and interests of belligerents with those of the non-combatant population in particular, and the rights of humanity in general.

No solution yet proposed seems more just or practicable. Considering the rôle which aircraft seems destined to play in the wars of the future and the frightful consequences which its unregulated use will produce, and considering both the paucity and inadequacy of the existing conventional rules, the recommendations of the Commission of Jurists deserve the urgent and serious consideration of the governments to which they are addressed. There is of course no lack of "cynics" who will say that these rules, like all rules for the conduct of war, will be of little value because in the stress of conflict they will be disregarded. But, as Mr. Root remarked, apropos of this argument which he foresaw would be directed against the Washington treaty of February 6, 1922 prohibiting the use of submarines as instruments for the destruction of merchant vessels and the use of gases in warfare, "cynics are always near-sighted, but often and usually the decisive facts lie beyond the range of their vision".[71] Not all, however, will share entirely his optimism when he adds that "when a rule of action, clear and simple, is based upon the fundamental ideas of humanity and right conduct, and the public opinion of the world has reached a decisive judgment upon it, that rule will be enforced by the greatest power known to human history, the power that is the hope of the world", but all will agree that solemnly ratified rules which the parties admit to be binding, whatever may be their defects, are better than no rules at all, and that there is at least a chance that they may serve to deter belligerents from illegal conduct, which in the absence of rules would be permissible.

[71] This JOURNAL, Vol. 16, p. 189.

THE FAR EASTERN REPUBLIC: A PRODUCT OF INTERVENTION

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The circumstances which led to the creation of the Far Eastern Republic as a new Russian state on terms of such perfect amity with the mother country that it was recognized immediately by her and received her warm financial and diplomatic support run back to the revolutions of 1917 in Russia. In Siberia the March Revolution was heartily welcomed and the Zemstvos took over the government. The bulk of the population was content with the abolition of Tzarism but the minority of communists started a Bolshevistic propaganda which succeeded after the November revolution, due to the energy of the communists, the armed help of Moscow and the apathy of the peasants. There was, however, a second minority composed of supporters of the old régime and its opposition to the organization of a soviet system in Siberia led to civil war.

Neither side had compunctions about its partisans. The ex-convicts who came into the communist camp filled with the single desire for revenge were no worse than the Cossacks who fought with the counter-revolutionary army. On both sides robbery, torture and murder were the natural methods of the desperadoes who joined them to serve their own purposes, methods which the responsible leaders deplored but could not prevent. The sympathies of the peasants and even of many of the wealthier land-owners gradually were driven to the side of the communists by the atrocities of the reactionaries. The latter, under General Horvath, who had the authority over the Chinese Eastern Railway, and the Atamans or Headmen, Semenov and Kalmykov, operated along the Mongolian and Manchurian borders, conveniently near to Chinese territory which they used as a refuge and base of operations and supplies. General Rosanov maintained his authority at Vladivostok until January 31, 1920, when the liberal Zemstvo was reinstated by the partisan forces supporting the Soviets. On the whole the Bolsheviki were in control and a sort of government was maintained by local soviets which exercised jurisdiction over as wide a region as their military strength permitted. The authority of the Moscow Government was shadowy and there was no other centralizing agency. Among the soviets organized during this period was one entitled: "The Far Eastern Soviet", which asserted its rule over the greater part of the territory later included within the Far Eastern Republic.

The Bolshevik régime in Siberia was interrupted by the Czecho-Slovak

march to the sea. The Czecho-Slovaks were troops, about 40,000 in number, who had deserted to Russia, prior to the latter's defection, in order to have an opportunity of fighting the cause of their own nationalities against the Central Powers. When that opportunity was lost due to the Soviets' withdrawal from the war the Czecho-Slovaks secured permission to retire from Russian territory via the Trans-Siberian Railway and Vladivostok. Their retirement was considered a potential danger by the German Government which induced Trotsky to have them disarmed. Partial disarmament led to fighting in which the superior training and discipline of the Czecho-Slovaks enabled them to gain rapid successes until, with the support of various groups of counter-revolutionaries, they had won control throughout eastern Russia and western Siberia before the end of June, 1918.

In the lull that followed the victorious progress of the Czecho-Slovaks the "Siberian Government" was created at Omsk with a liberal, Vologodsky, as President and Admiral Kolchak as Minister of War and Marine. Its aim was to provide a satisfactory center around which the bulk of the Siberian population, which was neither Bolshevistic nor Tzaristic, might rally. It allowed Bolshevistic influences to get control, however, and thus an opening was presented for a revolutionary *coup d'état*, out of which Admiral Kolchak emerged as "Dictator" of Siberia. At first expected to proclaim a program of monarchical restoration and regarded with suspicion by the liberals, Kolchak gradually won general support by a tactful reticence as to his ultimate policy and an effort to deal straightforwardly with all parties opposed to the Bolsheviki.[1] His relation to the Czecho-Slovaks was, however, rather one of dependence than assistance.

The period of foreign intervention, during which the Far Eastern Republic was established, began as early as December 30, 1917, when a Japanese warship entered the harbor of Vladivostok. Its mission was declared to be to protect Japanese in the city and surrounding country from any danger that might arise out of the troubled situation. The arrangement between the United States and the Kerensky Government, signed in the preceding June, as a result of which two hundred American engineers under Col. John F. Stevens had reached Vladivostok in November, had not yet accomplished anything. Great Britain and the United States informed the Vladivostok Zemstvo Board that they saw nothing irregular about Japan's action. Very shortly thereafter another Japanese cruiser, followed by cruisers of Great Britain, the United States and China, appeared in the harbor. Early in April, 1918, the Japanese and the British landed troops in the city.

The story of the Czecho-Slovak army's anabasis through Siberia is now well-known. Late in June, 1918, a part of these hard-fighting troops which had reached Vladivostok overthrew the local military forces in that city, leaving the civil rule in the hands of Zemstvo officials elected under Kerensky. They then sent a force westward to effect a juncture with the remainder of

[1] A. Bullard, *The Russian Pendulum*, Chaps. XX–XXV.

the army, which was still west of Lake Baikal, and to assist its evacuation of Siberia. Their success in these bold moves led directly to the large-scale intervention inaugurated by the United States and participated in, at her invitation, by Japan, Great Britain, France, Italy and China, which began in August. The then American Minister to China has pointed out that in the summer of 1918 the war seemed likely to be prolonged indefinitely, that Germany appeared to have Russia under her thumb, that the German and Austrian prisoners in Siberia were regarded as a menace and that the Allies still believed that the great majority of the Russian people needed only to be released from the perils of the Bolshevist power to be brought back into the war. Especially it was felt by the Allies and by the United States that the Czecho-Slovaks must be rescued and that the stores of food and munitions in western and eastern Siberia respectively must be saved from the Germans.[2] The lead taken by the United States was more apparent than real. Previous to America's declaration of August 5, 1918, Semenov and Kalmykov had been furnished with large sums for the hiring of mercenaries and with rifles and machine-guns, the responsibility for which was placed upon the Japanese. The inference is obvious that the intervention in force was announced by the United States as her proposal because her skirts were relatively clean and her statements would be least open to suspicion. The assurances of America that she harbored no designs of conquest and that the Powers associated with her in the intervention were acting upon her principles were calculated both to encourage the Russian people to maintain the struggle against Bolshevism and to quiet the alarm of the Siberians for their territory. All the Powers concerned solemnly promised to withdraw their forces when their common objects had been attained. The statement of the United States was most definite as to what these objects were: "to render such protection and help as is possible to the Czecho-Slovaks against the armed Austrian and German prisoners who were attacking them and to steady any efforts at self-government or self-defense in which the Russians themselves may be willing to accept assistance". As later events have testified, the objects which Japan regarded as justifying intervention were more far-reaching than those defined by the United States. Dr. Reinsch has stated that Japan tried for some months prior to intervention to secure America's recognition of her so-called special interests in Siberia but was unsuccessful.

The American, Japanese and other intervening troops which began to enter Siberia in August gave varying degrees of support to Admiral Kolchak, who had become the head of the counter-revolutionary forces. The Bolshevik armies were for a time consistently defeated. The Czecho-Slovaks, who wished to use the intervention as a means to overwhelm the Bolsheviki and reestablish the Eastern Front, were disappointed by American and Japanese

[2] P. S. Reinsch, "Japan's Lone Hand", in *Asia*, Vol. XX, Feb. and Mar. 1920, pp. 164–171.

refusal to consider the project. Compelled to abandon it they made their way back to Vladivostok unassisted and took ship for Europe. The important towns along the Ussuri and Siberian Railways, as far west as Lake Baikal, were occupied by foreign troops. Semenov was left in Chita, Kalmykov in Khabarovsk. In February, 1919, in order to defeat the Japanese party's purpose of monopolizing the management of the Trans-Siberian and Chinese Eastern Railways, the Inter-Allied Railway Commission was formed, in which the American engineering mission already mentioned was given the control of technical matters.[3] The commission's existence was to terminate, by agreement, when the foreign troops were withdrawn from Siberia.

Kolchak, sometimes aided, sometimes hindered, by his Cossack subordinates, maintained his campaign for the restoration of monarchy in Russia and Siberia for about a year. In June, 1919, the Council of Four at Paris promised him food, munitions, and supplies. Beyond such assistance the general Allied policy was "hands-off", and without military support Kolchak was unable to conquer the country against the guerilla warfare which was demonstrating that he had failed to keep the people's confidence. By December, 1919, he had fallen from power and in the following February he was shot by the Bolsheviki. When it became clear to the intervening Powers not only that their efforts were regarded as gratuitous but that the intervention was so hated by the Siberians that it was driving all classes into the Soviet camp all but Japan withdrew their forces, leaving only sixty Americans to guard the radio station on Russian Island.

Unfortunately, the troops were withdrawn a few months before the last of the Czecho-Slovaks had embarked, making it possible for Japan to maintain the intervention with some apparent justification. Accordingly, she not only continued the occupation but sent additional troops to a total of 50,000, though she had been limited by the original invitation to 7,000.[4] With these added forces and freed from the restraint previously imposed by the co-interventionists, Japan attacked the troops of the Partisans and prevented them from securing the fruits of their victory over Kolchak in the

[3] C. W. Ackerman, "Japan's Ambitions in Siberia", in *Current History*, April, 1919, pp. 109–112.

[4] The published statements vary concerning the numbers actually despatched to Siberia. The Japanese War Office stated on Jan. 31, 1919, that up to Nov. 1, 1918, a total of 73,400 troops had been sent over but that 13,800 of these were recalled in the succeeding months and that 34,000 more were to be recalled, 20,000 in January and February, 1919. (*Current History*, Apr. 1919, p. 121.) According to the *Statesman's Year Book*, 1921, the Japanese forces had been reduced to 39,000 at the end of 1919, but were increased to 50,000 in the spring of 1920. Figures given to the writer by the Japanese Legation at Peking were far smaller than any cited above. In 1921, after the evacuation of Baikalia, reduction again took place. When the order to evacuate the mainland of Siberia was issued Japan had approximately 25,000 men in the Maritime Province. Between 5,000 and 6,000 troops were left in Northern Sakhalin. Of the troops of the other Powers, the United States sent 9,000, China 2,000, Great Britain, France and Italy 1,500 each.

Maritime Province. She announced that her occupation would continue until Siberia was safe for her nationals to live in and until the danger of disturbance to the general peace in Korea and Manchuria had disappeared.

It was at this time that the Japanese, on the plea of protection to Japanese civilians, occupied additional points in the Maritime Province. The most consequential incident occurred at Nikolaievsk on the Amur, where, after the Japanese had broken a truce and attacked the Russian garrison, the latter massacred 120 helpless Japanese prisoners. As a guarantee of indemnity the Tokyo Government in July, 1920, ordered that Northern Sakhalin be occupied. The American Government inquired the reason for the occupation, suggesting, according to a Tokyo abstract of its note, that there was no connection between the occupation and the incident out of which it had arisen.[5]

Japan's action in Sakhalin was supplemented very soon by the appropriation of the Kamchatka and lower Amur fisheries, which were farmed out largely to Japanese fishermen, causing suffering to the local Russians and a loss of revenue to the governments of the Soviet Republic and the Far Eastern Republic to which the respective fisheries belonged. Presumably Japan adopted this method of assuring the renewal, at greater advantage to herself, of the Russo-Japanese Fisheries Convention which had expired. The month of April, 1920, had seen, also, an agreement forced upon the Zemstvo of Vladivostok by which a "neutral zone" was created along the Ussuri Railway, running from the southern border of the Maritime Province north 250 miles to the town of Iman, and also for a distance along the Suchan Railway in the south end of the province. Into this zone no Russian troops, whether or not they were the recipients of Japanese friendship, were to enter.[6] This agreement was not binding upon the Far Eastern Republic but it was, in the main, observed by its forces to avoid an open clash with the Japanese.

The Japanese policy has been the support of disorder. It is clear, from the accounts of various American eye-witnesses, that the Japanese military forces gave open support to various reactionary elements and in doing so participated in cruelties toward the Siberian population.[7] Meanwhile the Japanese military leaders were demanding concessions of mineral and other rights in such a way that the demands might be disowned by the government if they turned out to be unsuccessful.[8] This they were doing in spite

[5] *Japanese Intervention in the Russian Far East*, pamphlet published by the Special Delegation of the Far Eastern Republic to the United States of America, Washington, 1922, pp. 29–36; also *Current History*, Sept. 1920, p. 1086.

[6] *Japanese Intervention*, pp. 115–117.

[7] See article by Capt. S. C. Graves entitled "Japanese Aggression in Siberia" in *Current History*, May, 1921, pp. 239–245; also evidence of Major-General Graves, who commanded the American forces in Siberia, and Col. Morrow, given before the Senate Committee, April, 1922.

[8] Article by Dr. Reinsch, quoted above.

of general public opinion in Japan which was always opposed to the prolonged occupation of Siberia.

The creation of an apparently independent state, eschewing communism and possessed of great mineral and timber wealth, was determined upon by the Siberians in order, if possible, to persuade the world of their democracy and moral stability and thus to gain its support toward securing the evacuation of the Japanese forces.[9] In April, 1920, a convention of moderates from the region about Verkhne-Udinsk declared the establishment of the Far Eastern Republic. Within a month Soviet Russia extended her recognition. During the year the Japanese retired from the Amur and Baikalian Provinces and the bands of Semenov, Kalmykov and Kappel were driven east and south. Ungern, one of Semenov's generals, conducted an expedition into Mongolia and captured Urga, which later he made a base of operations against Chita. On February 12, 1921, the Constitutional Convention met in Chita and by April 26 it had adopted a constitution providing, as it declared, for a democratic republic.

During June, 1921, the Republic was compelled to meet attacks at three points: at Vladivostok, where the "White" or counter-revolutionary forces, assisted by Japan, set up the Merkulov Government,[10] at Khabarovsk, which Semenov, who had returned from a vacation at Port Arthur, failed to take, and at a border town between Urga and Chita, where Ungern was ignominiously defeated by Soviet troops which still maintain their occupation of Urga. The Chita Government worked hard to arrive at a peaceful *modus vivendi* with Japan, which, in the summer of 1921, still retained control in Vladivostok, Nikolaievsk and other places, thereby quite thoroughly dominating the Provinces of Primorsk and Sakhalin, including the Ussuri and Suchun Railways, the links connecting Vladivostok with the Trans-Siberian at Khabarovsk and with the Chinese Eastern at the Manchurian border, and bottling up the potentialities of commerce with the West. On August 26, the Dairen Conference was opened between representatives of the two Governments. It is not unlikely that the Japanese Government, which had recently been sounded by President Harding on the idea of a conference at Washington to consider Far Eastern and disarmament questions, hoped to be able to present such a conference with a *fait accompli* or at least the evidence of its generous intentions in Siberia.

This conference continued, with several minor deadlocks and prolonged adjournments, until April 16. The actual negotiations and other documents have not been made public but it is clear from the published statements of both sides that the cause of the breakdown after so many months

[9] "The President of the Far Eastern Republic", by H. V. V. Fay, in *Asia*, Vol. XXI, Oct. 1921, pp. 876–880, 894.

[10] The "Merkulov Brothers" were not displaced until August 8, 1922, when General Dieterichs, another "White" leader, was elected to head the Government. *Peking and Tientsin Times*, Aug. 16, 1922.

of deliberation was the refusal of Japan to evacuate Vladivostok. A trade agreement had been drawn up which was satisfactory to both sides. Because of Japan's insistence that an indemnity for the Nikolaievsk incident must be treated as a separate matter the Far Eastern Republic had consented to negotiate separately on it. A military agreement had been under discussion concurrently with the trade agreement. The Tokyo delegates insisted that the evacuation question, which was to be settled by the military agreement, could be decided only after the trade agreement had been signed. The representatives from Chita were equally insistent that a near date for evacuation must be definitely agreed upon and they were willing to sign the trade agreement only upon the condition that the military agreement, containing an acceptable evacuation date and excluding certain Japanese requirements amounting to a deprivation of adequate coast defenses, should be signed concurrently.[11]

During the progress of the Washington and Dairen Conferences revelation was made of certain alleged agreements between France and Japan providing for the landing of the remnants of the army of General Wrangel, the last of the "Whites" to challenge Trotsky's forces, at Vladivostok and for the protection of French interests in the Chinese Eastern Railway in return for French support of a Japanese protectorate over a "free republic in the Far East".[12] After the arrival of Wrangel's men an army was assembled, constituted of a mixed lot of reactionaries and this army, which was provided with an armored train and permitted to go through the "neutral" zone, actually captured Khabarovsk about Christmas, 1921. The Partisan forces were taken by surprise as they had not anticipated attack while the Dairen Conference was proceeding. Soon after that date they recaptured Khabarovsk and pursued the enemy down the railway line, finally crossing the boundary of the "neutral" zone set by the Japanese. This action brought the Japanese troops into open conflict with the Republic's army and very severe fighting took place, in which the Chita forces were driven out of the "neutral" zone. Since it is the essence of neutrality that impartiality prevail in the neutral's treatment of belligerents, Japan's tactics prove that her so-called neutralization was but a very thin disguise for a strategic area defending Vladivostok and providing refuge for hard-pressed counter-revolutionaries.

At the Washington Conference the Committee on Pacific and Far Eastern Questions gave considerable attention to the situation in Siberia. Baron Shidehara gave assurances that it was Japan's fixed policy to respect Russia's territorial integrity, the Open Door and the right of Russians to settle their own affairs. His reference to America's cooperation in the intervention in Siberia gave Mr. Hughes an opportunity, which he utilized with a candor

[11] See *Peking and Tientsin Times*, April 20 and 24, 1922.

[12] *Ibid.*, Jan. 7, 1922. The published documents state the condition made by France that "there should be no idea of permanent occupation or annexation."

amounting to bluntness, to state the attitude of the American Government toward the course events have taken since the American troops were withdrawn. His statements were concise enough: Japanese troops should have been withdrawn either immediately after the departure of the Czecho-Slovak troops or within a reasonable time; the Nikolaievsk incident was not a sufficiently serious catastrophe to justify Japan in occupying Russian territory as a means of securing a suitable adjustment with a future Russian government; on May 31, 1921 the United States had informed Japan that her occupation of Siberian areas "tends rather to increase than allay unrest and disorder in that region" and that "the Government of the United States can neither now nor hereafter recognize as valid any claims or titles arising out of the present occupation and control"; finally Mr. Hughes took occasion to "reiterate the hope that Japan will find it possible to carry out within the year their expressed intention of restoring Sakhalin to the Russian people". These assurances and statements were made part of the record of the Conference.

The Genoa Conference witnessed a warm passage at arms between Viscount Ishii, representing Japan, and Mr. Tchicherin, the Soviet Foreign Minister, speaking in behalf of the Far Eastern Republic. The former declared that Japan could not evacuate without a settlement in compensation for the Nikolaievsk massacre. Tchicherin countered with the assertion that the treacherous attack of Japanese soldiers was the cause of the blood shed. The Conference included the Far Eastern Republic in the Non-Aggression Pact, Japan inserting a saving clause excepting her occupation.

On July 1, 1922, Tokyo announced formally the decision of the Japanese government to withdraw all its troops from the Maritime Province by November 1. Subsequently the withdrawal order was extended to the main land opposite Sakhalin Island, of which Nikolaievsk is the center. In the absence of any definite statement respecting the island it was surmised that Japan was holding that as trading-stock and intended to secure in return for it liberal concessions of an economic nature if not an administrative lease similar to those which have been the bane of China, or an option for its purchase.[13]

The last important incident in the diplomatic career of the Far Eastern Republic was the Changchun Conference between Japan, the Soviet Republic and the Far Eastern Republic. This opened on Sept. 4, 1922 and was ruptured on Sept. 25.[14] Its purpose was to reconcile outstanding sources of disagreement. The Russian republics wanted Japanese recognition, trade and capital, the last if they could get it on non-monopolistic and non-

[13] Vice-Minister of War Kojima stated recently that there were twenty-nine Japanese companies in Northern Sakhalin, four concerned with forestry, six in mining, seven with oil and twelve with fisheries. *Peking and Tientsin Times*, Sept. 5, 1922.

[14] The "White" Government at Vladivostok was not represented.

political terms. Japan wants Russian trade and a reserved seat at the distribution of the mining, forest, railway and oil concessions that will be necessitated if Siberia is to be developed. The Russians do not feel particularly friendly toward Japan. They realize that they are impotent to develop their resources alone but they are determined to grant concessions only to individuals and organizations of their own choice.

The Changchun Conference proved to be more than a resumption of that of Dairen. A. A. Joffe, who headed the combined Russian delegations, is rated among the Soviets' foremost diplomats. He made it clear from the beginning that the policies of Moscow rather than those of Chita were to dominate the Russian proposals and attitude. He first demanded that the negotiations cover a general trade agreement between Japan and all Russia.[15] The Japanese, however, insisted upon limiting the scope of the conference to Far Eastern affairs, Russia to sign the ensuing agreement as an interested party. Thereupon M. Joffe called for a prior statement of Japan's prospective policy regarding the munitions at Vladivostok and the evacuation of Sakhalin. The reply on the first point was that the munitions would go to the Far Eastern Republic if a trade agreement were signed and placed in operation before the completion of evacuation; otherwise they would go to the "White" Government at Vladivostok;[16] on the second point Japan stated that Sakhalin would be evacuated when a recognized Russian government had agreed to a suitable indemnity for the Nikolaievsk incident. The Russian delegation was willing temporarily to waive the arms decision but declared that evacuation must precede any discussion of indemnity and declined to proceed with the conference unless the Japanese set a date for the evacuation of Sakhalin. Upon the rock of Japanese refusal to accede to this demand the Changchun Conference split and foundered. In declaring that the Russians had repudiated the Dairen statement agreeing to separate negotiations concerning an indemnity for Nikolaievsk the Japanese neglected the general condition laid down at Dairen as precedent to any agreement, viz., evacuation, of which there was no qualification.[17]

The rupture of the Changchun Conference left Japan and the Far Eastern Republic further apart than they were when it opened. This was due to the intervention of Moscow with insistence upon total evacuation and the sacrifice of immediate commercial relations to the larger policy of recognition for Soviet Russia, in fact if not in word. The precipitate action of the Russian delegations was not the result of sudden resentment at the position taken by the Japanese but the evidence of a policy previously enunciated at Genoa and the Hague of standing firmly, if not defiantly, for an international position of equality. That policy the Russians considered would have

[15] Statement of Russian Delegations, *Peking Leader*, Sept. 14, 1922.

[16] The munitions were the property of the Soviet Government as the successor of the former government of Russia to which they had been sold but which had not paid for them.

[17] *Japan Chronicle* (Wkly ed.), Sept. 7–28, 1922; *Peking and Tientsin Times*, Sept. 1922.

been disparaged had they entered into conventional relations with Japan as long as Japanese troops remained on Russian soil.

The true nature of the relationship between the Far Eastern Republic and the Soviet mother-state was placed beyond doubt by the course of the recent negotiations. As a spectator at Changchun informed the writer Mr. Janson, the chief delegate from Chita, practically stood at attention in M. Joffe's presence. The importance to all Russians of the problems involved in the liquidation of the intervention necessitated their treatment as all-Russian matters. Moscow assumed the role demanded by the situation and Chita was relegated in foreign affairs to the position of a self-governing commonwealth. It seemed, then, unlikely that the Far Eastern Republic would regain the appearance of independence but would, within no lengthy period, become an autonomous province of the Russian Socialist Federated Soviet Republic. In all but name it has never been anything else, though it has conducted its own foreign relations, in part, and has maintained a distinctly more liberal type of government. An agricultural state, it has been opposed to communism. There is, however, no racial friction and no separate nationalistic feeling,—rather race and nationalism are strongly uniting forces. The policy of friendship to small landholders and to outside capitalists, which the Soviets have found the only *modus vivendi*, largely breaks down the few obstacles to closer political relations. On the other hand, the Siberians will feel more and more the need of Soviet protection against foreign powers. The prophecy was justified that for the Far Eastern Republic the Changchun Conference was the beginning of the end.

The evacuation of the Japanese forces from the Maritime Province was completed on October 25, 1922. As had been anticipated the defense of the "White" forces immediately collapsed and the Red troops took possession of Vladivostok and the munition stores. With this event the turn of the buffer state had been served and on November 14 the Chita Government voluntarily dissolved, handing back to Moscow the powers received from her only two years earlier. Thus terminated successfully a unique experiment in constitutional organization for the conduct of international relations.

In recognizing local differences in Siberia and permitting a local group to work out its own destiny,—as far as this could be done without danger to the Central Government,—the Soviet leaders exhibited the same foresight and the same theory of government that has distinguished their policy in other regions, *e.g.* the Ukraine. They do not regard the establishment of so-called states as drawing a political boundary line and creating a sovereign enclave within the whole body of Russians. On the other hand these enclaves have been conceded a wide range of powers both in internal and foreign affairs. They constitute a type unique among modern states of the west, their relationship to the parent state being not unlike that formerly existing between China and Korea and today still in existence between China and Tibet.

The temporary establishment of a buffer state in the Far East has been a profitable experiment for the Soviet Government. The representatives of Chita in foreign countries, though unrecognized, have been more acceptable than those of Moscow, yet their diplomacy and propaganda have been effective in preparing the way for the latter. The Soviets have been enabled to feel out the attitude of Japan regarding a commercial agreement without recognizing the validity of her occupation, while Japan has been deprived of the bogey of Bolshevism, her strongest argument for the continued occupation of Russian territory. Events have marched rapidly, however, placing Moscow in a position to assert herself. There was no indication that the government at Chita resented its subordination, which, as already suggested, it had always recognized. Its position was one of consistent effort toward the rehabilitation of the Russian people and it appeared likely to follow the lead of its parent state, as heretofore, even at the sacrifice of its separate existence. Apparently it is content once more to form an integral part of the Russian commonwealth.

THE QUESTION OF EAST CARELIA

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Eastern Carelia is composed of the governments of Kemi, Archangel or the Provinces of Viena, Poventsa, Petroskoi, and the Olonets. It is bounded on the west by the eastern frontier of Finland, on the south by Lake Ladoga and the River Svir, on the east by Lake Onega and the White Sea, and on the north by the Arctic Ocean. It is about 300,000 square kilometers in area with a population of about 175,000 people. Of these 134,000 are Carelians of the Fenno-Ugrian stock; and the remaining 41,000, who speak Russian to a greater or less degree, are Vepses, Carelians, Finns, Laplanders, and Russians.

As early as 350 A.D. we hear of the Carelians in their present abode while Finland bordered on the regions of Hermaneric, the Goth. In 1227 under the pressure of the army commanded by Iaroslav Vsewolodovitch of Novgorod a part of the Carelians were converted to the Greek Orthodox religion. In 1323 the Sclusselburg peace between Russia and Sweden dismembered Carelia. And gradually during the fourteenth century it became more and more subjected to Novgorod. With the latter's fall in 1478 Carelia came under the domination of Moscow, and finally under Catherine II it was proclaimed a part of Russia. In 1809 at the peace of Frederikshamn the two portions of the Fenno-Ugrian race living in Carelia and Finland were united under the Russian rule. A common culture, language, and race facilitated natural economic, political, and social ties until the doctrine of self-determination gave form to the latent aspiration in the hearts of the Carelians, (namely, union with Finland or independence).

In 1905 at Uhtua a Carelian assembly sounded the first note of racial consciousness by demanding relief from a relentless Russification policy. This petition was signed by 3,000 people and demanded a constitutional form of government, political rights such as voting and the freedom of assembly, a redistribution of forest land, and the use of the indigenous language for culture and religion. But there was no relief obtained.

Then cooperation between Carelia and Finland became even closer after 1906. At that time the only place of educational, social, and economic opportunity open to the Carelian youth was Finland. Russia met all subsequent petitions by exiling the leaders to Siberia, closing libraries, lecture halls and schools. She forbade or hindered road construction, religious life, and cultural activities of all sorts.

Thus from 1906 to 1917 eleven years of oppression worked great hardships. In 1917 the inhabitants of the Olonets and Viena sent to the revolutionary government in Moscow a petition requesting their rights and national existence. On July 13 an assembly at Uhtua fixed the boundaries at the Svir, Lake Onega, the Uiku, and the White Sea. This same gathering demanded a return of the forest lands seized by the Russians, for the exploitation of which the Murman railroad had been built.

With the change in the revolutionary government and with the advent of Bolshevism complete independence was felt by the Carelians to be the only solution of their vexed problem. This was voted by the national assembly in Uhtua in 1918. On the 17th of March reunion with Finland was decided upon and the whole of Carelia accepted it. It was agreed the conditions were to be fixed by elected representatives sent to treat with Finland.

But at this juncture the question became an international issue. The British troops were sent to the Murman territory and violent fighting made it a theater of war. In March, 1918, the Carelians took a hand in order to throw off the yoke of Russian oppression. To complicate matters refugee Finnish Reds in Carelia formed a volunteer detachment to regain that country for the Russians, and they were successful in driving back the Carelians. Only the parish of Repola remained outside Russian domination. In autumn 1918 Murman lost its international importance. The Germans withdrew and with them the Finnish troops. Thus the English soldiers were drawn up along the frontier against Red Russia.

When the year 1919 came Carelia of Viena lay within the sphere of British action and Repola within the Finnish and Carelian, while all the rest suffered under the Russian reign of terror. In the spring of that year an assembly in the town of Kemi based its aspirations on the doctrine of self-determination and a committee of five was elected to seek recognition of independence at the Peace Conference in Paris. At the same time refugee Carelians in Finland, ensemble, presented their case to the representatives of the Great Powers at Stockholm.

Finland now agreed to the request of Porajarvi for protection. This it will be remembered had already been done in the case of the parish of Repola. In the autumn of this same year the British troops having been withdrawn, a resurge of Bolshevist forces into Carelia followed. They aimed to recover it but were very severely beaten by the natives at Kiestinki and retired routed on the 20th of October. A change in the governmental structure and the penetration of Russia into the very heart of the territory after its first defeat made a new meeting of the Diet a very precarious undertaking. Nevertheless it took place from March 20 to April 1, 1920, and in the presence of Russian troops an almost unanimous vote for union with Finland was polled. Repeated appeals to Finland found answer in the notes of that government to other states explaining the situation and asking for aid.

In the summer of 1920 peace negotiations began at Dorpat between Russia and Finland. The Finnish delegates were instructed to demand the right of self-determination for Eastern Carelia and specific guarantees for Repola and Porajarvi. Also emphasis was to be laid on the question of boundaries. These demands were met by Russia only half-heartedly and she remained master of Carelia until October 14, 1920 when the treaty was signed. To that pact was annexed guarantees for the parishes above-mentioned as well as promises of a locally recruited police force for East Carelia.

Russia had, however, already formed a separate worker's commune of East Carelia whereupon Finland accused her of violating the terms of the treaty. A series of bloody border skirmishes again raised hopes to fever heat, but they soon dwindled.

Finland's only source of relief lay in the League of Nations. She appealed to this body on the 8th of January 1922. It will be remembered that this appeal had been preceded by a memorandum to the Baltic Commission on the 15th of July 1919. But Russia now maintained Finland was responsible for revolts in Carelia and accused her of violating the treaty. These accusations, however, came with poor grace from the Soviet Government.

On January 12, 1922, the Latvian delegation proffered its good offices to aid the Council hoping it (the Council) would accept the role of mediator for peace in the Baltic. Later, at the ninth meeting of the Council of the League, January 13, 1922, Pusta for Esthonia and Saskenazy for Poland offered respectively their good offices in the matter. Finally at the eleventh public meeting, January 14, 1922, the following resolution was adopted.

> The Council of the League of Nations, having heard the statements submitted by the Finnish delegation . . . and the statements of the Esthonian, Latvian, Polish, and Lithuanian representatives, is willing to consider the question with a view to arriving at a satisfactory solution if the two parties concerned agree. The Council is of the opinion that one of the interested states members of the League, which is in diplomatic relations with the Government of Moscow, might ascertain that government's intentions in that respect.
>
> The Council could not but feel satisfaction if one of these could lend its good offices . . . to assist in the solution of this question. . . .
>
> The Secretary General is instructed to obtain all necessary information for the Council.[1]

This became then a question of interpretation of a treaty between two states, one a member of the League and the other not. The points at issue were Articles 10 and 11 together with the annexed statements to the peace of Dorpat. The former required the withdrawal of Finnish troops from Repola and Porajarvi. It gave East Carelia the right of self-determination and modified the treatment of the inhabitants of the two parishes. The latter dealt with autonomy of East Carelia, amnesty to fugitives, and non-militarization of the frontiers along two districts in question.

[1] *Official Journal*, No. 2, 3d yr., Feb. 1922, pp. 107–108.

At the eighth meeting of the Council, February 1, 1923, the question came up again. It was reported that Russia, approached by Esthonia, had refused to submit the case to the League for adjudication. M. Salandra proposed the reference of the question to the Permanent Court of International Justice for an advisory opinion.

> It was decided that the members of the Council should examine the question individually, and that, in conformity with the Council's resolution of January 14, 1922, the Secretariat should continue to collect any information which might be of use.[2]

M. Enckell, the representative of Finland, read a report at the seventh meeting of the Council, April 20, 1923. President Wood suggested the Council consider the statement at leisure and discuss it at a further meeting. It was adopted.

The eighth session was productive of results. It was held on the 21st of April and the following resolution of M. Salandra was adopted:

> The Council of the League of Nations requests the Permanent Court of International Justice to give an advisory opinion on the following question, taking into consideration the information which the various countries concerned may equally present to the Court:
>
> "Do Articles 10 and 11 of the treaty of peace between Finland and Russia signed at Dorpat on October 14, 1920, and the annexed Declaration of the Russian delegation regarding the autonomy of Eastern Carelia constitute engagements of an international character which place Russia under an obligation to Finland as to the carrying out of the provisions contained therein?"
>
> The Secretary General is authorized to submit this application to the Court, together with all the documents relating to the question, to inform the Court of the action taken by the Council in the matter, to give all necessary assistance in the examination of the question, and to make arrangements to be represented, if necessary at the Court.[3]

On the 23d of July, 1923, the Court gave its decision after a month of deliberation. The Court took an entirely different view of the question from that taken by the Council. It considered the main problem immediately before it was its competency, not the interpretation of the treaty. The reasoning follows:

The League of Nations treaties do not bind non-member states and any decisions or jurisdiction over questions where one is involved can only be exercised by consent of the non-member. Russia's refusal to submit the question has made it impossible for the Court to give a decision in this case. As for the settlement of the question between Russia and Finland, that can only be done by an examination of the documents from which it arises. A finding on this matter now would constitute a settlement of the case which is not the purpose of the Court, nor does it fall within its jurisdiction. Finally the Court finds that since Russia will not give her consent it (the Court) can

[2] *Official Journal*, No. 3, 4th yr., Mar. 1923, p. 222.
[3] *Ibid.*, No. 6, 4th yr., June, 1923, pp. 577, 578.

do no more than await the actions of the League to bring both parties together in cooperation.

Four of the judges felt that the Court was competent to handle the question. They were Weiss, Bustamante, Nyholm, and Altamira. The full bench consisted of Loder (president), Weiss, Finlay, Nyholm, Moore, Bustamante, Altamira, Oda, Anzilotti, and Huber. One deputy, namely, Wang Chang-Hui sat on the case. M. Enckell presented the Finnish case.

The Finnish Foreign Office immediately declared that it still held Russia bound under the treaty of Dorpat. The decision was regarded there as a weakness in the Court and an attempt to throw off domination by the Council. Friends of the Court rejoiced in the finding since they saw independence and vigor in the new tribunal. James Brown Scott is reported to have said:

> Recognizing the independence and equality of states in explicit terms, the decision is calculated to rejoice believers in judicial settlement, to convince the lukewarm and indeed to cause opponents to reconsider the reason for their opposition. A simple decision such as this is a justification of judicial settlement and a promise of an immense and beneficent usefulness.[4]

Due to the Greek-Italian question which had come to a head by this time the interests of the League were occupied in another direction and the question of East Carelia was passed on to the Sixth Commission. This reported on the 24th of September, 1923. M. Miercowicz stressed the importance of the question and it was decided that the Council should continue to collect information. The report was approved and the question was placed on the agenda of the Assembly.

On the 27th of September in the Assembly, after a short address by Enckell, Salandra, who acted as rapporteur, gave a short report divided between two points. The first simply recognized the findings of the Court in the matter. The second proposed, in spite of the Court's declaration of incompetence and suggestions contained therein, that the Assembly must not be hindered, for the sake of peace, from taking all action necessary, even in a case where a nation was outside of the League; and even if that state refuses to take part in the negotiations and arrangements. M. Branting thought the second part should be omitted, but the Assembly retained it at the suggestion of Hanotaux and Lord Robert Cecil. The formulation of the questions at issue were then entrusted to the Secretariat.

The last reports tell of deeds of violence on the Carelian side of the boundary. Russia maintains Finland is responsible and Finland emphatically denies the accusation. A lively exchange of notes is going on, although nothing more serious than what has already happened is taking place. We must not forget, however, that war is possible at any minute depending on a deviation in the Russian policy. Aggression from the Finnish side would be preposterous and no fear need lie in that direction. But Finland fears for the next Russian move.

[4] *New York Times*, July 24, 1923, p. 1, col. 1.

EDITORIAL COMMENT

THE JANINA-CORFU AFFAIR

If ancient customs are still to be regarded as supplying the substance of the law of nations, the *lex talionis* is indisputably a part of that law. It is a simple formula. If you are injured, injure still more in return; and thus obtain justice!

Before we can make much progress in satisfying the growing juristic sense of modern civilized nations, it will be necessary to realize that international custom is not an adequate law-maker but merely a registration of a state of mind that requires further analysis and review.

This has long been recognized, and intelligent opinion, both popular and professional, is at present alive to the necessity of repudiating precedent in international affairs as rapidly as enlightenment permits the amelioration of practice.

In nearly every department of human activity intelligent agreement, based on some clear principle of rectitude, has been substituted for unreflecting violence. What we call "civilization" is chiefly the result of this substitution. Even in international affairs it has made some progress, but far less than in most other forms of human relationship.

The reason for this is no doubt the conception of "sovereignty" as the irresponsible *potestas suprema* by which the world has so long been ruled, reinforced by the disposition of even more liberal forms of government to claim all the prerogatives of those cruder and more brutal forms which they have superseded.

There is, however, a process of change in this conception of sovereignty now subconsciously taking place which will inevitably, if it is carried to its logical conclusion, result in the extension of the substitution of voluntary agreement for imperative command in the law of nations, as it is being substituted in the sphere of civil government in all modern states. The process consists essentially in abolishing violence, even in the enforcement of law, by making the law itself its own best argument for obedience. Experience has taught and continues to teach that the *lex talionis* does nothing for the elimination of wrong, but merely multiplies and perpetuates its repetition and its consequences.

The assassination of three international commissioners of the Italian Government on Greek soil, at Janina, followed tempestuously by the forcible occupation of the island of Corfu, resulting in the death of innocent children, affords a fitting occasion for serious comment upon the progress made in international adjustments. These comments are not offered in the spirit

either of condemnation or of condonation, but with the purpose of measuring the stage of progress that has been attained.

If precedent alone could determine the rightfulness of the occupation of Corfu, justification certainly was not wanting, and the general indignation expressed at the time of the incident was superfluous. In America we appear to have wholly forgotten the forcible occupation of Vera Cruz in 1914, where the provocation was far less serious and the action even more reprehensible. There was, indeed, an important difference between the two performances, and to that we must later give consideration, but in both instances, without any appeal to organized justice, the spirit of arrogance, on the pretext of national prestige, resulted in the loss of entirely innocent lives.

There are antecedent causes in the Greco-Italian embroglio which deserve an attentive study. The first of these is the exasperation of national sensibility, and the second its influence in urging on immediate action and offering justification for violence.

Neither the assassination at Janina, if as charged it was sanctioned by the Greek authorities, nor the cannonade on Corfu was the result of a single isolated antecedent. After a period of mutual friendship and sympathy there had, in 1912, supervened a distrust and a hostility on the part of Greece which had produced a corresponding sentiment in Italy. So long as the Sultan of Turkey was a common enemy, all had gone well between the Greeks and the Italians. When, in 1911, the Libyan War broke out, the Greek press was full of enthusiasm for the Italian "brothers", and every Italian victory over the hereditary foe was celebrated at Athens. When later the thirteen "Greek islands", as they were held in Greece by right to be,—"the Dodekanese", as they were loosely called,—were taken as pledges by Italy, there was rejoicing in Hellas; and when these islands were reported to have been "liberated" by the proclamations of the Italian admirals, and an insular congress was held by the inhabitants in the monastery at Patmos to establish an "autonomous State of the Aegean", as a writer well expresses it, "Italy and Greece celebrated a brief honeymoon." Then, in October, 1912, came the Treaty of Lausanne, by which the dream of an insular autonomous Greek state was dissipated. Italy "temporarily" retained the thirteen islands. The occupation, it was announced, was to last only until the last Turkish soldier had left Libya. That happened some time ago; but, notwithstanding two alleged agreements of evacuation, Italy still retains possession of these islands.

From the first this "temporary" tenure aroused suspicion in Greece. The population of these islands, almost entirely Hellenic, has now for ten years detested the Italian supremacy, and the spirit of irredentism has spread to the whole of Greece—an impulse to war which only the Greek defeat in Turkey and other causes rendered inoperative.

In 1913, the feeling engendered by the occupation of the islands taken from Turkey was accentuated by the creation and delimitation of Albania

as an independent state. A collision between Greece and Albania over the possession of two provinces caused a new sense of hostility, this time felt in Italy as much as in Greece. The Albanians claimed the provinces as "Southern Albania", the Greeks as "Northern Epeiros".

The feeling of alienation between the two countries now became one of bitterness, which soon voiced itself in words of warning. "If you wish to remain friends of Italy," said Signor Giolitti to Mr. Venizelos, "do not touch Valona." At the Conference of Corfu, in 1914, says Mr. William Miller, who had personal knowledge of the subject, "The feeling against Italy in Corfu at that time was such, that when an Italian steamer ran aground upon the reef near the islet of Vido, she had to remain there for several days, because no Corfiote could be induced to get her off the rocks!" He also records that his wife, when attending the jubilee of the union with Greece, was begged by the chairman of the exposition not to speak Italian, for "otherwise", he said, "the Italians will claim that this is an Italian island."

It was upon this background of suspicion and hostility that the assassination at Janina occurred. Then came the second act in the drama. General Tellini and his suite were attacked and killed while on their mission as Italian members of the international commission to delimit Albania.

It is unnecessary here to sit in judgment upon the circumstances of the assassination or to state the minute particulars. The official investigation will in due time furnish such information as is attainable. What is of importance for these comments is that the incident, in the conditions of antecedent mutual suspicion and hostility, could not fail to awaken deep indignation in Italy, a volume of wrath and resentful emotion that created an occasion for the head of the state, voicing the sentiment of the nation, not only to demand redress but to inflict, in the interest of Italian prestige, a conspicuous public humiliation upon Greece. In doing this by the immediate military occupation of Corfu, Signor Mussolini was undoubtedly obeying the will of a united people. As in the case of Vera Cruz, the slaughter of innocent persons was considered only an unfortunate by-product of a necessary action! Thus closed the second act of this pitiful tragedy.

That which made the occupation of Corfu really appalling is the widespread belief that such an incident could no longer happen in Europe, under the aegis of the League of Nations and the guardianship of the great Powers, —the trustees of peace. In this it differed from all precedents. The authorization of international custom was supposed to have been superseded by the authority and obligations of a covenant denying its legitimacy.

On this account more than on any other an almost universal public indignation relegated to second place the crime of assassination at Janina, and fixed its gaze upon the slaughter of the innocents at Corfu. The first, if one tries to find justification in human passion, seemed possibly an ordinary act of murder by irresponsible outlaws, a work of mere brigands that might happen in any country. Its sequence seemed a deliberate governmental

act by a great Power,—a trustee of peace,—bound by a formal obligation to an accepted code of honor. The practice of bandits was indeed charged by Italy to the Greek Government. Was a responsible government, even if this charge were true, to be permitted to make an assault upon an innocent population in order to punish the guilty?

The money penalty demanded of Greece was a heavy one; and the crime, if fixed upon the accused government by the evidence, justified a heavy indemnity. And yet it was a crime, if really perpetrated by a government, that no pecuniary indemnity could expiate. The whole controversy, in view of the nature of the charges, centres upon something infinitely more important than any amount of money. It was due to Italy that her grief should not find satisfaction at a price in gold, and to Greece that she should have her day in court.

All eyes turned spontaneously to Geneva. It was there, and not at Corfu, that Italy's charge and Greece's honor could find a real vindication. And Geneva was ready and waiting. The Council and the Assembly were in session.

It would be a satisfaction if it could be said at the present date that assurance had been given that in the future an arbitrary and indefensible action by a great Power against a small state can find redress at Geneva. In this the expectation of many has been disappointed. Much has been said in praise of the League's machinery for avoiding violence by conciliation. No one disputes the intention to bring such machinery into existence, but it would be a bold assertion to affirm that it exists in a sense that applies to any great Power.

Mussolini's attitude toward the League of Nations in this present case is what might happen in any instance where the national temper of a great Power happened to be involved. Such a Power could upon any occasion say, This matter is not one which concerns the League.

Article 15 makes it as clear as language can make it that "any dispute likely to lead to a rupture, which is not submitted to arbitration" (as under Article 13) "the Members of the League agree that they will submit to the Council." Was not the Janina-Corfu incident one of this character? It is superfluous to say that the occupation of Corfu was not an act of war but only the taking of a guarantee. There was a "dispute" over the assassination at Janina that was already more than "rupture". It is impossible to doubt that, whether guilty or not, Greece had a right of appeal to the Council, as she did appeal.

What was the attitude of the Council? The appeal remained, and still remains in its hands. "Till some settlement between the two countries took form, League delegates seemed unable to apply themselves to serious discussion of other subjects" writes an eye witness. "Assembly meetings were postponed altogether for several days—not, indeed, because they could not have been held, but because it was felt every effort must be made to

avoid giving opportunity for speeches. . . . They may not have made public speeches, they may not have passed resolutions, but their private discussions and their personal declarations have made it clear that on the main issue he had chosen to raise Signor Mussolini had ranged resolutely against him every nation in Europe, in America (North and South), in Asia and in Africa, so far as those nations were represented at Geneva." And yet the Assembly took no action!

And what was the reason for this ominous silence? The same writer answers in the terms of a spokesman of one of the smaller states, "that what the lesser states were fearing was some general deal—not at Geneva, but at Paris—between the three greater Powers in which Great Britain would be a party to some prejudicial compromise behind the backs of the world-parliament at Geneva. . . . All I have said here," he continues, "was being said daily at Geneva by nine out of ten of the delegates out of whom the Fourth Assembly was composed. The question cannot, moreover, be left here. Not only are the smaller nations conscious of the rivalry between the Ambassadors at Paris and the League at Geneva, but they are convinced that the Ambassadors' Conference is perpetuated mainly to enable the three great Powers to run Europe as they will." And it was to this "rival" Conference of Ambassadors that the Council, after silencing the Assembly, turned over the settlement of the Janina-Corfu controversy!

We may, indeed, be thankful that this Conference of Ambassadors was able to terminate the incident, as an incident, by inducing the Premier of Italy to evacuate Corfu, and to influence Greece to pay the indemnity demanded. We are not informed of the arguments employed in the conversations held in that secret councilroom, but it does not escape our recollection that the permanent Italian possession of Corfu would give Italy absolute control of the Adriatic; and as Italy had insisted that "Northern Epeiros" and Corfu could never be allowed to be in the same hands, so Italy has been on more than one occasion reminded that Corfu cannot be in Italian hands, and thus afford a safe pocket for the Italian fleet for incursions into the Mediterranean. As a question of diplomacy, it must have been certain to the mature statesmen of the Council, or at least to those who directed their activities, that the question of evacuating Corfu could be settled by the Conference of Ambassadors when it could not be determined by the League, because the former had the interests and the force to demand evacuation.

In commenting upon this so-called "settlement", which the advocates of the League proudly although somewhat nervously represent as a fruit of its efforts—at evasion?—the European writers regard it from somewhat conflicting points of view. In England there are those who declare that the Council would have acted had it not been for French opposition. In France it is well known that Lord Robert Cecil's spontaneous urgency for action was checked by orders from London. But apart from the battle-field of

recrimination and national propaganda it is certain that the Council failed to act because it was impotent, and the Assembly kept silence out of deference to the great Powers.

At this point it is not inappropriate to raise the question, What would have resulted if the articles of the Covenant which Lord Robert solemnly caused to be publicly read in the Assembly as indicating the duty of the League had actually been put into operation by the action of the Council? Everyone at Geneva understood that, if this happened, Italy would withdraw from the League and refuse to submit to the action of the Council. It was known also that under the direction of the Council not a ship could be depended upon to move or a regiment to march, to compel Italy to evacuate Corfu and to submit to the judgment of the Permanent Court of International Justice the amount of indemnity. Hence the caution of the Council, the silence of the Assembly, the disappointment of the advocates of the Covenant, and the transfer of the entire responsibility to the Conference of Ambassadors, as had been done in the adjustment of every other dispute of importance which had not been voluntarily referred to the League by the contestants.

But suppose there had been in the League a great Power that felt it imperative to insist upon the literal enforcement of the obligations under Articles 13 and 15 and the infliction of the penalties for the violation of them under Article 16, what would then have happened? It is appalling to think of the consequences of thus construing Italy, under Article 16, as being automatically at war with all the members of the League. And it would have been natural to say to the Power thus insisting upon the fulfillment of the Covenant,—the United States, for example,—"Since you insist on this, you are the one to execute the penalty"!

And thus we see how utterly futile is a plan for peace which incorporates the *ultima ratio* of the *lex talionis* as the basis of its structure, automatically imposing the violation of peace in the effort to enforce peace.

Happily, there was in the Council enough of diplomatic sense to see this, and to act upon it. Having no legal rule of judgment to apply, the Council could at best only have reached a compromise, and the Covenant was uncompromising. It demanded action. And so the problem was handed over to be settled in the manner of the old diplomacy by the Conference of Ambassadors, which is just what would have happened if the League of Nations had not existed.

The occasion is opportune for the question, Is there really any other way?

So long as international decisions rest upon force, no matter who exercises it, only a negative answer can be given. And it must be conceded that force is just as legitimate in the hands of the interested Powers themselves as in the hands of a Council made up of them, besides being much more effective.

There is place, however, for another supposition. Let us suppose that,

instead of a Permanent Court of International Justice before which no aggressor can be cited without his consent, the aggrieved nation could by previous agreement cite the aggressor before the court, with a legally defined procedure in a case of international tort, what would then be expected to happen?

In such circumstances Italy could find her guarantees in the court and in the law, and Greece could make a defense if her innocence rendered it possible. If Italy won her cause and Greece declined to accept the judgment, Italy could then act as executing a judicial decision. But is it probable that Greece would refuse to execute the decision? And, to go to the root of the matter, is it probable that, with such a prospect of being found guilty, any responsible government would ever countenance assassination?

Does it not appear possible, if the *lex talionis* were divested of its traditional justification in international relations, as it has been in so many others, that it would in the course of time wholly disappear from the thoughts of statesmen as a method of seeking justice?

The League of Nations, having revealed its incompetency under the pretension of preponderant power, might well consider if it did not seriously impede the progress of justice by rejecting the recommendations of its Commission of Jurists to bring all really justiciable cases within the compulsory jurisdiction of its court, and progressively to extend the range of justiciable cases by clarifying and developing the law of nations through the law-making conferences which its experiment has interrupted.

DAVID JAYNE HILL.

THE NEUTRALIZATION OF CORFU

Discussion of the recent Italo-Greek controversy seems to have taken little note of the fact that Corfu, occupied by Italian forces on August 31, 1923, as a "measure of temporary character, not as an act of war, but only to safeguard Italian prestige and to manifest its inflexible will to obtain reparations which are due in conformity to the usages of international law",[1] is neutralized territory.

The Republic of the Ionian Islands was placed by the treaty of Paris (November 5, 1815) under the protectorate of Great Britain, but the arrangement did not prove wholly satisfactory to the islanders, and upon the establishment of George I upon the Greek throne under the guarantee of Great Britain, France and Russia in 1863, Great Britain suggested union of the Republic with Greece. The European significance of the status of the islands was, however, fully realized, and in a note of June 10, 1863, Lord John Russell, British Foreign Minister, suggested that after the desire of the

[1] See Italian identic notes of August 31, 1923, to Greece, to the great Powers, and to Italian diplomatic representatives abroad, *L'Europe Nouvelle*, Oct. 6, 1923, 6: 1288.

people of the islands had been ascertained, a conference be held by Austria, Prussia, Great Britain, Russia and France, the first four being parties to the Treaty of Paris and the last three to the treaties guaranteeing the Greek dynasty. In this note Lord John Russell expressed his sensibility "to the value of Corfu as a maritime and military station" and of "the apprehensions felt in Austria and Turkey at the prospect of the abandonment of the Ionian Islands by Great Britain". "It has been suggested in England" he continued, "that Corfu might be retained while the other islands might be given up. But Her Majesty's Government conceive that it would be a perversion of the trust confided to them by Europe and a breach of faith toward the Ionian people, if Great Britain were to turn a portion of a single free and independent state under her protectorate, into a part of her military possessions and to make Corfu an element of her European power".[2] The result was the Treaty of London of November 14, 1863, ratified by the five Powers. This treaty provided for renunciation of the protectorate and union of the islands to Greece, but in view of the considerations mentioned, based doubtless on the strategic position of the islands with reference to the Adriatic, Articles 2 and 3 declared:[3]

> Art. II. The Ionian Islands, after their union to the Kingdom of Greece, shall enjoy the advantages of a perpetual neutrality. Consequently no armed force, either naval or military, shall at any time be assembled or stationed upon the territory or in the waters of those islands, beyond the number that may be strictly necessary for the maintenance of public order, and to secure the collection of the public revenue.
>
> The high contracting parties engage to respect the principle of neutrality stipulated by the present article.
>
> Art. III. As a necessary consequence of the neutrality to be thus enjoyed by the United States of the Ionian Islands, the fortifications constructed in the Island of Corfu and its immediate dependencies, having no longer any object, shall be demolished, and the demolition thereof shall be effected previously to the withdrawal of the troops employed by Great Britain for the occupation of those islands in her character as Protecting Power. This demolition shall take place in such manner as Her Majesty the Queen of the United Kingdom of Great Britain shall deem sufficient to fulfill the intentions of the high contracting parties.

These provisions were subsequently modified. In the London Conference of January 25, 1864, Austria and Prussia gave their adhesion to an announcement by Great Britain, France and Russia, the three guarantors of Greece:[4]

> 1. That it is not necessary to insist upon the limitation prescribed by Article II of the treaty of 14th of November, as to the naval and military forces to be maintained by Greece in the Ionian Islands.

[2] Martens, *N. R. G.*, 18: 52.
[3] *Ibid.*: 57; Holland, *European Concert in the Eastern Question*, p. 47.
[4] *Ibid.*: 60; Holland, *op. cit.*, p. 50.

> 2. That the advantages of neutrality established by the same article in favor of the seven islands shall apply only to the Islands of Corfu and Paxo and their dependencies.

Consequently it was proposed to modify Article II of the treaty in the forthcoming treaty between the three Powers and Greece. This treaty was concluded on March 24, 1864, and after providing for the union of the islands with Greece declared:[5]

> Art. II. The courts of Great Britain, France, and Russia, in their character of guaranteeing Powers of Greece, declare, with the assent of the courts of Austria and Prussia, that the Islands of Corfu and Paxo, as well as their dependencies, shall, after their union to the Hellenic Kingdom, enjoy the advantages of perpetual neutrality.
>
> His Majesty the King of the Hellenes engages, on his part, to maintain such neutrality.

This article is still in force.

The occupation of territory as a measure of reprisal to enforce demands under international law has been frequently resorted to, as in the American bombardment of Greytown, Nicaragua, in 1854, the British bombardment of Kagoshima, Japan, in 1863, the British occupation of Corinto, Nicaragua, in 1895, the French occupation of the Turkish island of Mytilene in 1901, and the American occupation of Vera Cruz, Mexico, in 1914, and has been justified by text writers.[6] Can such a procedure be applied against neutralized territory?

Germany declared that her invasion of the neutralized territories of Luxemburg and Belgium in August, 1914, "were not intended as acts of hostility" but were essential for self-defense.[7] Luxemburg and Belgium, as well as Great Britain and France, however, considered such pacific occupations of neutralized territory contrary to the treaties of 1839 and 1867. They considered the principle that neutral territory is inviolable, established by customary international law as well as by the V Hague Convention of 1907, permanently applicable to territory neutralized by treaty.[8]

It is to be noticed that the Italian occupation of Corfu differs from the German occupation of Belgium and Luxemburg in that Italy was not a party to the treaty neutralizing Corfu. Unless it could be argued that this treaty created a status which had been accepted by the public law of Europe,[9] Italy was, therefore, under no special limitations with respect to Corfu.

[5] Martens, *N. R. G.*, 18: 65; Holland, *op. cit.*, p. 54.

[6] Oppenheim, *International Law*, 3rd ed., Vol. 2, secs. 33–37. Some of these cases are referred to in comments on the Corfu occupation by Vittorio Scialoja, *L'Europe Nouvelle*, 6: 1203; A. L. Lowell, *World Peace Foundation*, 6: 170; Lord Robert Cecil, statement to British Imperial Conference, London *Times*, Oct. 13, 1923, p. 6.

[7] U. S. Naval War College, *International Law Documents*, 1917, pp. 101–102.

[8] *Ibid.*, pp. 53, 86, 116, 182.

[9] This argument was advanced with reference to the status of Belgium by Visscher, *Belgium's Case, a Juridical Enquiry*, 1916, p. 142.

Great Britain, France and Russia, however, would seem under special obligations to object to the occupation.

Italy was, however, a party to the League of Nations Covenant, by Article X of which the members of the League agree "to respect and preserve against external aggression the territorial integrity and existing political independence of all members of the League." Italy has argued that occupation of Greek territory as a temporary measure of reprisal involves no want of respect for the territorial integrity of Greece. Certainly Article X contains a less sweeping prohibition of territorial occupations than does Article I of the V Hague Convention with respect to neutrals. The latter declares "The territory of neutral Powers is inviolable."

Lord Robert Cecil, in the British Imperial Conference of October, 1923, drew attention to the strong feeling in the League that "the occupation and bombardment of Corfu was, in the circumstances, not a defensible proceeding."[10] Doubtless this feeling arose mainly from apprehension that Article XII of the Covenant had been violated. By this the members agree "that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after award by the arbitrators or the report by the Council." Italy argues that reprisals are not war, which alone is to be delayed by this article, and doubtless numerous precedents sustain her.[11]

The question of violation of the Covenant by Italy is of course wholly distinct from the question of the competence of the League to discuss the dispute between Italy and Greece. This competence would seem to be clear from Article XV, which provides, "If there should arise between members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration in accordance with Article XIII, the members of the League agree that they will submit the matter to the Council." The Italians, however, call attention to Article XIII by which "The members of the League agree that, whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration and which can not be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration," and assert that Article XV does not become applicable until the resources of diplomacy have been exhausted, which situation they say had not arrived in the dispute with Greece over the Tellini murder.[12]

Doubtless the report of the commission of jurists appointed by the Council, on this point as well as on the right of a country to resort to reprisals when war is prohibited, will serve to clarify the meaning of the Covenant.[13]

[10] London *Times*, Oct. 13, 1923, p. 6.

[11] Scialoja, *L'Europe Nouvelle*, 6: 1203.

[12] *Ibid.*

[13] For questions submitted to the special commission of jurists for report to the December meeting of the Council see, *League of Nations, Journal of the 4th Assembly*, Sept. 29, 1923, p. 231; *League of Nations, Monthly Summary*, 3: 215; *L'Europe Nouvelle*, 6: 1292.

Perhaps a more notable feature of the dispute, however, is the evidence it gave of the practical capacity of the League to preserve peace. The dispute began with the assassination of a representative of a great Power in the territory of a lesser Power; it proceeded by an ultimatum demanding participation by representatives of the great Power in the apprehension and prosecution of the offenders; it reached a crisis through rejection of that ultimatum by the lesser Power and culminated in the invasion and occupation of neutralized territory. In all these respects the case parallels the events of July and August, 1914. Europe was possibly more vividly impressed with the calamities of war in the latter case, but it is perhaps not without importance that in that case an agency existed for assuring a conference of the type which Sir Edward Grey vainly strove to summon in August, 1914. "If the League of Nations had not existed" wrote Lord Robert Cecil, "one would not have been able to show how all the opinion of the world really lay on one side."[14]

QUINCY WRIGHT.

INTERPRETATION OF ARTICLE X OF THE COVENANT OF THE LEAGUE OF NATIONS

At the meeting of the Institute of International Law at Brussels in celebration of the fiftieth anniversary of its founding, that illustrious body considered, among other matters of importance, the legal interpretation of Article X of the Covenant of the League of Nations.

In the Fourth Assembly of the League of Nations, Article X was considered, and an interpretation sought to be given which would meet with the approval of the countries composing the League of Nations.

The interpretation of this famous article was very similar, indeed, it is said to be identical. M. Rolin, who was present at and acted as Assistant Secretary of the Institute of International Law, was rapporteur of the First Commission, to which the question of interpretation was submitted, and, likewise, rapporteur of the sub-committee formed for its consideration. It was evident, therefore, that he was familiar in all its details with the discussions of both the Institute and the Assembly. However, he did not need to draw upon his recollections as to the actions of the Institute, because the text of that body was communicated officially to the First Committee by His Excellency M. Adatci, Ambassador of Japan, and one of the two rapporteurs of the text in the session of the Institute.

It has been thought advisable to state these details, minute and uninteresting as they may seem in themselves, in order to show the importance of

[14] *L'Europe Nouvelle*, 6: 1201. For opinion of other European statesmen and documents on the settlement of the controversy by the League and the Council of Ambassadors, see *ibid.*, 6: 1201–1207, 1286–1293; *League of Nations, Monthly Summary*, 3: 212–215; *World Peace Foundation*, 6: 169–210.

the interpretation of the League of Nations—a political body—confirming, as it did, the interpretation of the Institute of International Law—a scientific body.

The official English text of Article X is thus worded:

> The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

The meaning of this article was the subject of long and profound discussion by the Institute of International Law. Its interpretation was adopted at the meetings of the 9th and 10th of August, and the following is an English translation of the French text:

Resolutions concerning Article 10 of the Covenant of the League of Nations

Adopted at the Sessions of August 9 and 10, 1923

I

By Article 10, the members of the League of Nations obligate themselves collectively and individually with regard to each other:

(1) to respect the territorial integrity and the existing political independence of all the members of the League;

(2) to maintain this territorial integrity and this political independence as against all external aggression.

This second obligation implies for every state which is a member of the League, the guarantee that, in case of aggression from another state, the members of the League will lend it assistance with a view to maintaining or reestablishing the *status quo* threatened or destroyed by violence. The legality of the claims which may have been the cause of the aggression is not thereby put into question, and recourse to proper pacific procedure looking to eventual satisfaction remains reserved.

The guarantee of Article 10 applies to the case of an aggression which is a *fait accompli*, and to that of a recourse to war which would not involve violations of engagements undertaken by Articles 12, 13 and 15 of the Covenant. There is thus no conflict with the exercise of the collective sanctions as provided for in Article 16 of the Covenant.

II

The assumption of the guarantee is the execution of a judicial obligation directly arising from the Covenant.

In the present organization of the League the assumption of the guarantee imposes upon the states which are members the duty of applying to the aggressor the two sanctions pronounced as obligatory by Article 16 of the Covenant, *i.e.*

(1) Severance of trade and financial relations;

(2) The obligation of permittng passage across their territory to the

forces of all members of the League who participate in a common action to the end that the engagement of the League be respected.

Each of the states which are members remains the judge of the question whether, and in what measure, it is obliged to assure the execution of its duty of guarantee by the employment of the military forces at its disposal.

III

Each state which is a member shall decide concerning the circumstances which effect the obligation of guarantee, but it is for the Council, in virtue of Article 10 of the Covenant, to decide, by a majority vote, whether or not there is occasion for the guarantee to be made effective.

In accordance with Article 15 of the Covenant, neither the vote of the aggressor nor the vote of the victim of the so-called aggression is counted.

IV

In case of aggression, the Council, in accordance with Article 10, should meet at once to draw up a concerted plan of action, and make all necessary recommendations to the members for their specific cooperations in its execution.

The employment of the sanctions mentioned in No. II above may precede the deliberations of the Council.

It should be stated that the vote in favor of the text was twenty, the vote opposed to the text was one; twenty members abstained from voting. If it be borne in mind that a member abstains from voting when he does not wish to declare himself in favor of the text and yet is unwilling to record himself as opposed to it, it is evident that there was great difference of opinion among the members.

Upon the initiative and insistence of Canada, the Assembly of the League of Nations took up the question of Article X under much the same conditions. The Canadian Delegation to the First Assembly suggested that Article X be struck out. In 1921 the Second Assembly refrained from action and referred the matter to the Third Assembly, "in view of the great differences of opinion"—to quote from the *Monthly Summary of the League of Nations*[1]—"expressed concerning the scope and significance of this article and its relation with the other articles of the Covenant, as well as the importance of the legal and political arguments invoked both for and against elimination."

At the Third Assembly, meeting in 1922, the Canadian Government withdrew its original suggestion of eliminating the article and proposed in lieu thereof, two amendments. They were communicated to the governments of the countries belonging to the League, with the request for opinions, before the meeting of the Fourth Assembly and, to quote the *Monthly Summary*,[2] "On the basis of the opinions received, and after exhaustive discussion, the Juridical Committee of the Fourth Assembly proposed a resolution interpreting Article X."

[1] The Fourth Assembly, Vol. III, No. 9, October 15, 1923, p. 198.
[2] *Ibid.*

The official reports of the League bear out the statement of "exhaustive discussion". The members of the First Committee exchanged their views, and decided to proceed by way of interpretation instead of amendment. They appointed a subcommittee to prepare a text. Of this subcommittee, M. Henri Rolin, of Belgium, was rapporteur, and the text as originally prepared was his. Reported to the First Committee, it was adopted with an amendment proposed by Sir Willoughby Dickinson, representing the British Empire.

There was a strong current of opinion against the interpretative text on the part of states which feared a lessening of the obligation to protect their independence and territorial integrity, of which Article X seemed to be a guarantee. M. Barthélemy, representing France, objected, inasmuch as in his opinion the interpretation modified the obligation. The British amendment apparently removed his scruples, and he voted his country in its favor. The First Committee adopted the text as amended by 26 in favor, to 4 against; and on September 24, 1923, it was laid before the Assembly of the League by M. Henri Rolin, rapporteur. His address is a carefully considered document, giving the origin of the question in its successive stages, and justifying the interpretation which the Committee had approved.

It was to be expected that Canada, as sponsor of the question, would be heard. Sir Lomer Gouin represented Canada on this occasion. He insisted upon the necessity of interpreting Article X, and he voiced his approval of the proposed interpretation. In the course of his remarks he said,

> The interpretation given is that of the Amendments Committee and also of the Committee of Jurists. It was also given on August 10th, 1922, by the Institute of International Law at its Brussels meeting, and is, besides, that of the creator of Article 10 himself, ex-President Wilson, as well as of ex-President Taft, Sir Frederick Pollock, M. Oppenheim and M. Larnaude, and every writer, I may say, on the subject of Article 10.[3]

M. Motta, representing Switzerland, and Chairman of the First Committee, proposed that the question go over, to which Sir Lomer Gouin objected. A vote was therefore taken on the following text:

> The Assembly, desirous of defining the scope of the obligations contained in Article 10 of the Covenant so far as regards the points raised by the delegation of Canada, adopts the following resolution:
>
> It is in conformity with the spirit of Article 10 that, in the event of the Council considering it to be its duty to recommend the application of military measures in consequence of an aggression or danger or threat of aggression, the Council shall be bound to take account, more particularly, of the geographical situation and of the special conditions of each state.
>
> It is for the constitutional authorities of each member to decide, in

[3] Verbatim Record of the Fourth Assembly of the League of Nations, thirteenth plenary meeting, Tuesday, September 25, 1923, p. 2.

reference to the obligation of preserving the independence and the integrity of the territory of members, in what degree the member is bound to assure the execution of this obligation by employment of its military forces;

The recommendation made by the Council shall be regarded as being of the highest importance, and shall be taken into consideration by all the members of the League with the desire to execute their engagements in good faith.[4]

The President of the Assembly, His Excellency Cosme de la Torriente y Paraza, of Cuba, thereupon addressed the Assembly:

Gentlemen—The following is the result of the ballot:

The following states voted for the interpretative resolution:

Australia, Austria, Belgium, Brazil, British Empire, Bulgaria, Canada, Chile, China, Cuba, Denmark, France, Greece, Hungary, India, Ireland, Italy, Japan, Luxemburg, Netherlands, New Zealand, Norway, Portugal, Salvador, South Africa, Spain, Sweden, Switzerland, Uruguay.

Total 29

The following state voted against the interpretative resolution:

Persia.

The following states were absent or abstained:

Albania, Costa Rica, Czechoslovakia, Esthonia, Finland, Haiti, Latvia, Liberia, Lithuania, Panama, Poland, Siam, Venezuela.

Total 13

Total number of votes 43

For the resolution 29
Against the resolution 1
Absent or abstaining 13

A resolution containing an interpretation of an article in the Covenant can only be adopted by a unanimous vote.

As unanimity has not been obtained, I am unable to declare the proposed resolution adopted.

In accordance, however, with a precedent, which arose in a similar case, I shall not declare the motion rejected, because it cannot be argued that, in voting as it has done, the Assembly has pronounced in favor of the converse interpretation.

I accordingly declare the proposal not adopted.

It may nevertheless be advisable that the result of the voting and names of the members who voted should be communicated to the Council, which may regard the result as important.

I propose, then, that the result of the voting on the draft resolution should be communicated to the Council. (*Assent.*)

The purpose of the committee in considering Article X and proposing an interpretation is perhaps best stated by M. Politis, representing Greece, and

[4] Verbatim Record of the Fourth Assembly of the League of Nations, thirteenth plenary meeting, Tuesday, September 25, 1923, p. 8.

a former Minister of Foreign Affairs of that country. "This interpretation", he said, "has the great advantage of allaying certain apprehensions which have been shown. It has the further advantage of enabling us to hope that it may facilitate the entry into the League of that great Republic of which we are all thinking." [5]

JAMES BROWN SCOTT.

FROM SÈVRES TO LAUSANNE [1]

The Treaty of Sèvres of August 20, 1920, was as fragile as the porcelain of that name, though lacking its charm. It was an old fashioned treaty, like that of Versailles, imposing the harsh terms of a relentless victor. Neither treaty revealed much magnanimity or statesmanship. The Turks were able successfully to resist the imposition of the Treaty of Sèvres. The measure of their success may be seen by a comparison of the more important terms of the treaty compared with those of Lausanne signed on July 24, 1923.

In 1920, the Sultan's Government, under the pressure of the Allied Powers in Constantinople, was constrained to accept the Enos-Midia boundary which left to Turkey only so much of European territory as was represented by Constantinople and a small *hinterland* for the protection of the capital. In 1923, the Turks received back approximately their old boundary line with Bulgaria and Western Thrace, which remained with Greece, including the Holy City of Andrianople which holds the tombs of the early Sultans. In 1920 they agreed to surrender Smyrna with a large outlying district to the Greeks, though retaining a fictitious sovereignty subject to extinction by a plebiscite to be held under the auspices of the League of Nations. In 1923 they retained this territory without any restrictions whatever. In 1920 they agreed to an independent Armenia and ultimately to an independent Kurdistan. The Treaty of Lausanne makes no mention of either.

The Treaty of Sèvres provided an absolute guarantee of the freedom of the Straits by leaving Greece in control of the European shore of the Dardanelles, while the Treaty of Lausanne leaves Turkey in complete control from the Aegean Sea to the Black Sea.

The Treaty of Sèvres, though recognizing the inability of Turkey to make "complete reparation" for its responsibility for the World War, imposed the obligation to pay "for all loss or damage suffered by civilian nationals of the Allied Powers in respect of their persons or property through the action or negligence of the Turkish authorities during the war and up to the coming into force of the present treaty." (It will be recalled how this phrase "damage suffered by civilian nationals," was distorted in the case of the Treaty of Versailles to include pensions and separation allowances.) A

[5] Verbatim Record of the Fourth Assembly, September 25, 1923, p. 5.

[1] See editorial on The Lausanne Conference in April, 1923, issue of this JOURNAL.

financial commission was imposed on Turkey with the most sweeping powers of a national receivership. The Treaty of Lausanne merely provides for the payment by Turkey of its foreign debts due before October 29, 1914, in a manner convenient for Turkish finances, and also for a pro rata distribution of the obligations represented by the revenues of former portions of the Ottoman Empire.

The Treaty of Sèvres reimposed the régime of the Capitulations abolished by the Turks on October 1, 1914, whereby foreigners had acquired so privileged a status as to be contemptuously independent of Turkish jurisdiction and to reduce the sovereignty of the nation to a fiction. It is true the Treaty of Sèvres also provided for a complete revision of this régime, but Turkey was obligated in advance to accept the decisions of the Allied Powers on the subject. The Treaty of Lausanne explicitly provides for "the complete abolition of the Capitulations in Turkey from every point of view," without any safeguards for foreigners in judicial matters other than (1) the agreement of the Turks to employ foreign legal advisers to receive complaints and exercise a sort of platonic surveillance of the administration of justice; (2) the concession that foreigners may settle questions concerning *personal status* according to their own laws and customs in their own national courts; and (3) the agreement to recognize in Turkish courts private agreements in civil matters arrived at by the parties concerned.

In the matter of commercial concessions, the Treaty of Sèvres revived all concessions granted prior to October 29, 1914, including certain doubtful ones which had not been legally validated before the outbreak of the World War, notably the French concession for the construction of the Samsoun-Sivas Railway accorded as a part return for a loan by French financiers early in 1914. The British also had a doubtful claim in a concession of the Turkish Petroleum Company in Mesopotamia and Mosul, as well as another claim to a concession for the construction of quays, docks and arsenals. The Treaty of Lausanne failed to validate all of these foreign concessions, with the exception of those above noted. In these cases the treaty provides for equitable treatment either by permitting the carrying out of the concessions or by indemnization. It should be remembered in this connection, that the Nationalists had already committed themselves in principle to the French concessions by the Treaty of Angora of October 20, 1921. The French delegates at Lausanne endeavored to obtain from the Turkish delegates full recognition of whatever rights had been acquired under that treaty, but were able only to elicit an acknowledgment of their note on the subject.

The Turks at Lausanne stood firmly and consistently on the platform of their National Pact of 1919, which asserted the right of Turkey to a full sovereign status on an equality with all other nations. That they were so successful was due to two facts: first, that the Allied Powers were disunited and mutually distrustful; and second, that the Turks after the landing of Greek troops in Smyrna, in May, 1919, had been aroused to a supreme

national effort. They were willing to fight for their principles and for the last stronghold of the nation in the mountains of Anatolia, while the Allied Powers, on the other hand, were utterly unprepared after the terrific strain of the World War to sacrifice any more lives or treasure. The French had been compelled by serious troubles with the Nationalists in Cilicia and by the revolt of the Arabs in Syria, to make great concessions to the Angora Government. The Italians, wearied by their military adventures in Tripoli, Albania, and Asia Minor, were likewise constrained to make peace with the Nationalists. Great Britain had "bet on the wrong horse" in the tragic struggle between the Greeks and the Nationalists in Asia Minor, and was in no mood for further adventures.

When the Allied Powers, therefore, met the Nationalists at Lausanne, they were at a humiliating disadvantage. The Turks, who had been humiliated many times before and compelled to yield to threats and bluster, now had the delicious satisfaction not merely of resisting the European Powers but ultimately of imposing their own terms. Nor was the old diplomacy of *bazarlik* (bargaining) any longer of avail: there was little left with which to bargain.

In insisting so completely on their sovereign rights, the Turks may have gained more than was good for the nation, inasmuch as neither during the baleful reign of Abdul Hamid nor the disastrous rule of the Young Turks after 1908 had it been possible to train an adequate body of officials to enable Turkey properly to meet all of its international responsibilities and serve effectively its own immediate interests. This may be corrected in part by an enlightened policy of seeking freely the advice of disinterested foreign experts in all branches of public administration.

It is a pleasure to note that, with respect to foreign missions and other philanthropic enterprises established before October 29, 1914, and which on the whole have ministered admirably to the needs of the peoples of the Near East, the Nationalists at Lausanne agreed that they should be treated with the same consideration as similar Turkish institutions, taking into account the peculiar nature and conditions of each.

It is also a pleasure to note that the Nationalists have seen fit to continue the privileges accorded by Mohammed the Conqueror, after the capture of Constantinople in 1453, to the non-Moslem communities to decide questions of *personal status* according to their own usages and customs. As already noted above, this same privilege has likewise been granted to nationals of the Allied Powers.

Following the negotiation of the Treaty of Lausanne, the United States and Turkey signed a treaty of amity and commerce on August 6, 1923, according similar rights as contained in the general treaty. A treaty of extradition was also signed on the same day.

It has been argued that the United States should refuse to ratify any treaty with Turkey that failed to restore the privileges of the régime of the

Capitulations or that ignored the rights of the Armenians to independence. The inference would seem to be that, alone of all the Powers, the United States should be prepared, either to allow an unhappy, unsettled state of affairs to be prolonged indefinitely, or to fight. Either alternative would seem to be utterly inadmissible under actual conditions. There remains no other reasonable alternative than to accept the logic of the situation, and to trust to wise diplomacy and to the disinterested high services of Americans in Turkey to contribute efficaciously to the reconstruction of Turkey. A policy of delaying ratification of the treaty with Turkey, or worse still, of its rejection, would serve only to irritate needlessly the Nationalists and seriously to impede or nullify the efforts being put forth by various laudable agencies, commercial as well as philanthropic, to assist in the tremendous task of the economic, social, moral, and spiritual regeneration of the afflicted peoples of the Near East.

PHILIP MARSHALL BROWN.

INTERNATIONAL COOPERATION AND THE EQUALITY OF STATES

The Cuban Society of International Law, established on the eve of the World War, has held its regular meetings notwithstanding that catastrophe, and appears to be as vigorous as on the day of its birth.

It has the custom of opening its annual session with an address by the Secretary of State for the time being, an officer who, notwithstanding the name, is in fact, Minister of Foreign Affairs. These are brilliant occasions, for the Latin is by temperament and preference an orator.

The Sixth Annual Meeting was held at Habana, on April 23, 1923. The speaker of the occasion was Dr. Carlos Manuel de Céspedes, for many years Cuban Minister to the United States, and the son of Carlos Manuel de Céspedes, leader of the Revolution of 1868, for the independence of Cuba.

The Secretary of State chose for his subject "International Cooperation", and his words were as weighty and as wise as they were eloquent, as is evident even in a translation of the following passages:

> The problems which such extraordinary circumstances [following the World War] have brought about are really great and difficult; but events have certainly come to pass during the short period of time since your last meeting, which would seem to justify more and more the belief that the existing difficulties in Europe and in America might be rightly and justly solved, if the Powers would only get together in favor of the most fruitful principle of our science, which is, no doubt, the principle of international cooperation.

His Excellency the Secretary of State felt it necessary not merely to define the expression, but to state the sense in which he proposed to use it, and the conditions under which it could be advantageously employed in the intercourse of nations. On the first point he said,

> Let us, then, conclude that international cooperation is the outward shape assumed by the actual good disposition existing between two or more nations in respect to the solution of such problems as may have a common interest for them. It endeavors to find and determines the precepts and rules of equity and justice which are to be laid down as of a general or special character for the solution of situations of fact or of law; and whenever diplomatic resources are exhausted in respect to the assertion or establishment of what is right, it provides the instrumentalities or the means which may be deemed necessary for stating what the law is and its acceptance. If the last resort to which any state or people may appeal is still, unfortunately, war, international cooperation in all the relations existing among them can and must be resorted to in order to avoid it.

As to the conditions under which alone it can be serviceable, the distinguished speaker said,

> But international cooperation, such as I understand it, can yield all its beneficial results only among such entities as stand on a footing of equality to each other. The principle of equality among nations is what constitutes the fundamental bases of international cooperation. That equality is in its turn founded upon a mutual respect, no matter how the military force or the territorial or economic importance of the nations may differ.
>
> Without this, which may be called a condition precedent, any cooperation between the weak and the strong, results, in the end, in the more or less complete imposition of the will of the latter upon the former; and since only such countries, whether large or small, as fulfill their international obligations and enjoy a certain prestige owing to the stability of their institutions, truly deserve and even compel the respect of others, it is quite plain that even in the most favorable cases, there is not in truth any possibility of a real international cooperation among nations unless they are considered as equal through the mutual good opinion which they may have for each other within the great family of civilized nations. For that reason it is always in the self-interest of a nation to raise itself higher and higher in the opinion of foreign nations through the practice of civic virtues and the maintenance of liberty, justice and order, all of which are indeed indispensable to the happiness of any people and the good international reputation of their government.

In the same year of 1923, but a few months later—to be specific on November 30th—the Honorable Charles Evans Hughes, Secretary of State—that is to say, Minister of Foreign Affairs—of the United States, had occasion to deliver an address before the American Academy of Political and Social Science, in Philadelphia, on the Centenary of the Monroe Doctrine. It is not, of course, to be taken as a reply to his distinguished colleague of Cuba, but it shows how the American mind conceives international problems, and the basis upon which cooperation among the Americas is possible, for in this case, Secretary Hughes was not speaking of European affairs, but of the principles upon which the cooperation of the American Republics should be based—at least he stated those principles as far as the United States are

concerned, in whose behalf he is, by virtue of his office, authorized to speak. In its outlook upon the American continent, and the relations which should exist between the American Republics, America is one, if the views of Mr. Hughes, representing the North, and Dr. Céspedes, representing Latin America, are to be accepted. In clear, precise and unmistakable terms, the American Secretary of State explained the policy of his country,

> *First.*—We recognize the equality of the American Republics, their equal rights under the law of nations. Said Chief Justice Marshall: "No principle of general law is more universally acknowledged than the perfect equality of nations. * * * It results from this equality that no one can rightfully impose a rule upon another."
>
> At the first session of the American Institute of International Law, held in Washington in the early part of 1916, the jurists representing the American Republics adopted a declaration of the rights and duties of nations. This declaration stated these rights and duties "not in terms of philosophy or of ethics but in terms of law," supported by decisions of the Supreme Court of the United States. The declaration set forth the following principles:
>
> I. Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states.
>
> II. Every nation has the right to independence in the sense that it has a right to the pursuit of happiness and is free to develop itself without interference or control from other states, provided that in so doing it does not interfere with or violate the rights of other states.
>
> III. Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States, "to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them."
>
> IV. Every nation has the right to territory within defined boundaries and to exercise exclusive jurisdiction over its territory, and all persons whether native or foreign found therein.
>
> V. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe.
>
> It can not be doubted that this declaration embodies the fundamental principles of the policy of the United States in relation to the Republics of Latin America.

It is impossible to overstate the importance of Secretary Hughes' address, for it appears to be the first time that a Secretary of State, speaking under a restraining sense of official responsibility, has declared that the policy of the United States is not a thing of philosophy or of ethics, but that it is based upon distinct and concrete principles of law, which he states as having the approval of the Supreme Court of the United States.

In embarking upon American relations we are not setting forth upon uncharted seas; and the compass is before the eyes of him who steers the Ship of State.

JAMES BROWN SCOTT.

CUBA AND THE UNITED STATES: EXCHANGE OF AMBASSADORS AND OF VIEWS

The United States and Cuba decided, in the course of the present year, to raise their legations to the rank of embassies. The United States accredited as its first Ambassador to Cuba, Major General Enoch H. Crowder; Cuba has more recently appointed Dr. Cosme de la Torriente as its Ambassador.

Under ordinary conditions an ambassador comes, an ambassador goes. He presents his credentials and makes an address. His credentials are received and an address is made in reply by the chief executive. In all this change there is, however, a constant element, the state, and if it could speak in its own behalf, it might well use the words which Tennyson has attributed to the brook: "For men may come and men may go, but I go on forever."

The state speaks through its agent and each agent of the state on this occasion took advantage of the change from legation to embassy to express the policy of his country. The American Ambassador and the President of the United States outlined the policy of their country to Cuba: the Cuban Ambassador and the President of Cuba sought to define the policy of their country to the United States. Therefore, the addresses delivered on this occasion have an importance which they would not otherwise possess, for they state the interests of the two neighboring republics and define the policies which they would pursue.

General Crowder has had a long and distinguished career in the Army of the United States. It was he, who, many years ago, captured Sitting Bull. More recently he was Provost Marshal General during the war with Germany, and through his initiative, skill, and relentless energy, the large army for service in the World War was admirably and promptly recruited. During the Spanish American War he served in the Philippines, rising to the rank of Brigadier General of Volunteers. During the intervention in Cuba during President Roosevelt's administration, he was Secretary of State and Justice (1906–1908) and was responsible for the series of laws which were enacted in order to prevent a recurrence of conditions which might lead the United States to intervene in the future. Quite recently, he was sent to Cuba as the personal representative of President Wilson and was continued as such by his successor, President Harding.

To General Crowder's initiative and knowledge of Cuban laws and local conditions are due the adjustment of the presidential difficulty which troubled that sorely tried little island.

General Crowder was formally received by Alfredo Zayas, President of the Republic of Cuba, on March 5, 1923. The address which the Ambassador delivered on that occasion in presenting his credentials, is one of those rare documents which says all that is to be said, and leaves little or nothing to be added even in the way of comment. This is what the Ambassador said:

> The relations of our respective countries have a high significance. They are not only members of the great confraternity of enlightened nations of the world, but are sister republics of America, with the same ideals of liberty, and of traditions of justice to all. The bonds of affection and respect which unite our countries are strengthened by the fact that both have been, not only neighbors in peace, but also brothers in arms in two great conflicts, each having for its righteous aim similar and related ends. Bonds of mutual interest and friendship, born of such associations, are well nigh indissoluble.
>
> I need not say, Mr. President, that I esteem as a very great honor the elevation of my representation here from Special Representative of the President of the United States to Ambassador Extraordinary and Plenipotentiary of the President and of the nation, but my appreciation of that honor lies principally in the opportunity it affords me for service to both countries. I have additional satisfaction in the fact that my entrance upon my duties as diplomatic representative of my Government in Cuba occurs at a time when the policy of open diplomacy and frank cooperation among nations, to the exclusion of ulterior purpose, has become so generally recognized as to constitute a rule of conduct for me near your Government. Under such conditions we may look forward to complete success in the realization of the very strong desire of my Government that all those great transformations which have been undertaken under Your Excellency's administration for the welfare of the Republic of Cuba will be continued and completed in a definite way.

Presentation addresses are usually formal documents. Were it not beneath the dignity of diplomacy, they might be called "cut and dried". General Crowder's was dignified and full of feeling. The reply of President Zayas is equally dignified and full of feeling, with more than a suggestion of the equality upon which diplomatic relations must be based. On these occasions the ambassador or minister usually speaks in his own language; Americans are required to use English, or as our Revolutionary forefathers preferred to call it—the language of the United States. President Zayas naturally replied in Spanish as the language of Cuba. Each actor on the international stage furnishes the other with a copy of the address in the language of the original and in translation, and, faithfully reproduced in the official English translation, this is what President Zayas said:

> The reference which you have so wisely made of the lofty significance which the relations between our respective countries have, fills me with satisfaction, because not only do you remind us that both are members of the great confraternity of civilized nations, but that they

maintain the same great ideals of liberty and of justice toward all, they being sister republics of America.

During days as glorious as they were decisive we maintained together the supreme ideal of the Cuban people of being free and independent, in order to constitute a republican government in Cuba founded upon democratic principles; and united by common sentiments we were later joined in a double enterprise, in favor of the good of humanity.

These are memorable events which have naturally originated growing ties of friendship and which had as a precedent and solid foundation the unforgettable and noble joint resolution of your honorable Congress of April 19, 1898 in which it was declared that the people of the Island of Cuba are, and of right should be free and independent, and that the United States deny having any desire to exercise jurisdiction or sovereignty, nor to intervene in the Government of Cuba unless it be to pacify it, and affirmed their intention of leaving the dominion and government of the Island to its people, once its intention was realized. Such beautiful statements have engraved an indelible sentiment of gratitude in our hearts.

Cuba has made an exchange in kind. Dr. Torriente has had an excellent military career, and has for years past been prominent in the domestic and foreign service of his country. In the days of American neutrality toward Spain, Dr. Torriente, then a young man, visited the United States in behalf of the Cuban Junta. His purpose was to fit out what is called filibustering expeditions against Spanish authority in Cuba. His actions brought him into conflict with the neutrality laws of the United States. On one occasion he was defended by no less a person than the Honorable George Gray, then United States Senator from Delaware, and later a Circuit Judge of the United States. On more than one occasion Mr. Torriente inspected American prisons from the inside, because of his patriotic activities. Later, he had an occasion to inspect British prisons in the West Indies for the same cause. But when the United States declared war against Spain, Mr. Torriente was able to exchange filibustering for active soldiering in the field. He landed in Cuba, serving with one army after another, reaching the rank of Colonel, and Chief of Staff of an Army Corps. After the independence of his country was secured, he had the honor to represent Cuba in Spain and to sign the first treaty between the mother country and its rebellious offspring. Later he was Secretary of State in the Cabinet of President Menocal; still later a Senator of Cuba and Chairman of the Committee on Foreign Affairs of the Senate; more recently, a representative of Cuba in the Assembly of the League of Nations, of which in the present year he had the great honor to be president.

From Geneva, he came to Washington, where, on the 13th of December, 1923, he was officially received by the President of the United States. On that occasion he delivered an address full of good will to the United States, expressing his gratitude for the intervention of the United States, which procured the liberty of his country, assuring the President that all who

participated in the great and trying movement are truly grateful to the United States, and that the present generation is likewise inspired by a spirit of gratitude.

But why continue a summary? His address states his views and the views of his country!

> In entering upon the duties of my office by addressing Your Excellency in the name of the President of Cuba and, therefore, of my nation, I cannot but recall the days, which are already somewhat distant, during which the Cubans struggled bravely to obtain their independence and the great American people, whose President was then the eminent statesman William McKinley, accepted with enthusiasm the declarations of the memorable joint resolution of April 20, 1898, in which the Congress recognized and affirmed, then and for all time, the principle for which the heroic soldiers of Maximo Gomez, Antonio Maceo and Calixto Garcia were giving up their lives.
>
> As a member of the glorious legion which, under the command of Calixto Garcia joined the American Army led by General Shafter which had disembarked and laid siege to the city of Santiago de Cuba, I had the honor of fighting alongside of the generous foreigners who were offering their lives or shedding their blood to achieve that which their country had promised the world: the independence of Cuba. Till then I had entertained, in common with all soldiers of Cuba, a great admiration and sympathy for the United States of America; at that time, to those sentiments there was added the most profound gratitude, such as is natural that every heart should feel when a great good has been received. And what other benefit could exceed the powerful and decisive aid rendered us in obtaining our sacred and much longed for independence, for which, during the greater part of the past century, thousands of Cubans perished in exile, in prisons, on the scaffold and on the battlefields? These sentiments are today those of all Cubans who were men at the time of the establishment of the republic, they are at the same time the sentiments of all the younger generation, which since then has grown up cherishing great devotion to their country, and it is those sentiments which make the mission which I now undertake an especially grateful one, since I am among those who consider that there can be no really fruitful diplomatic action which is not based on sympathy and appreciation for the nation to which one is accredited.
>
> But I would not be loyal if, in speaking to Your Excellency, in the name of the President of Cuba, I did not recognize that, at times, as Your Excellency well knows, in the daily relations between the Governments of Washington and Havana, differences in judgment have arisen, which in the long run might have produced sentiments distinct from those which should prevail between two peoples so closely united by their geographical situation, by history, in which there are pages common to both of them, and by great material interests of all sorts, had it not been that the statesmen of the two countries have on all occasions endeavored to prevent, or to do away with, difficulties of every kind, yielding at times somewhat in their opinions and even in what they considered to be their rights in accordance with their interpretation of the convention which permanently regulates our mutual relations.
>
> The Cubans passed from the condition of a colony to a Republic, as

did all the other peoples of our race in America, when popular education had not yet attained the degree of perfection necessary for the best exercise of the rights which the constitution of every democratic state grants to its citizens. In order to reach that degree of perfection in the functioning of her institutions, of which the majority of her sister nations of America are today a model, the Republic of Cuba, although we recognize that she began her independent existence at a more advanced period of civilization—three quarters of a century after the former—has had and will still have to struggle against difficulties of every kind, as for a long term of years other peoples who did not suffer the evils of which Cuba has been the victim have been compelled to do, until by degrees she shall rid herself of them, as she has gradually been doing. When these evils are recalled and set forth one by one by her critics, if the latter are shown, in contrast to those evils, the virtues, the achievements and the progress of the Cuban people, they will surely be confounded and, if they act in good faith, they can be brought to recognize their error.

Fortunately, Mr. President, up to the present time, in the course of our independent existence, Your Excellency's predecessors, as also Your Excellency, have never forgotten the rôle which the United States assumed with respect to Cuba, since the famous joint resolution of 1898 was voted, and thus it has been that your cooperation, whenever we have needed it, has ever been loyal and sincere. Nor have the Presidents of the United States failed to recognize the fact that in order that Cuba might continue to maintain its position as a sovereign and independent people in the consort of the free nations of the world, nothing should be done to injure its international personality; as otherwise the cooperation which Cuba can lend in the furtherance of the great ends which all America is called upon to realize, would greatly suffer, for not in vain has God placed Cuba at a point in the world at which the great routes of communication cross each other and is, for this reason, destined, at a future not far distant, to serve as a bond of union between diverse races and civilizations, as is evidenced by the fact that Havana should have been chosen unanimously by the nations of this continent as the seat of the Sixth Pan American Conference.

Your eminent Secretary of State, Mr. President, speaking a few days ago before the American Academy of Political and Social Science at Philadelphia, declared his conformity with the declarations made by the American Institute of International Law at its first session held in Washington in 1916, which is as though Your Excellency himself had so affirmed, among which are the following: that "every nation has the right to exist, and to protect and to conserve its existence"; that "every nation has the right to independence in the sense that it has a right to the pursuit of happiness and is free to develop itself without interference or control from other states, provided that in so doing it does not interfere with or violate the rights of other states"; and that "every nation is in law and before law the equal of every other nation belonging to the society of nations". These declarations of the famous Institute, in voting which the highest juridical authority of Cuba took part, are the ruling principles in the international policy of the Government of President Zayas, and to second him in its development he has sent me here, confident that Your Excellency will lend Cuba, as up to now has been done, the friendly advice and aid of which Your Excellency's

Secretary of State spoke in the address to which I have alluded above, thus making my mission extremely easy.

The reply of President Coolidge is graciousness itself. Expressing the satisfaction which would naturally be pleasing to the Chief Executive of the United States at the mention of its services to Cuba, he stated in short but measured language the desire of the American people "to see that independence safeguarded and Cuban prosperity assured". But, as in the case of the Ambassador, the President should speak for himself:

> I value highly the appreciation which you so cordially express of the assistance rendered by the United States to Cuba during the latter's struggle for independence. It is the desire of our people to see that independence safeguarded and Cuban prosperity assured.
>
> It is true, as you state, that differences of opinion have arisen regarding the position which the United States occupies with respect to Cuba. But I am sure that as regards the fundamental aspects of this position, our statesmen are in accord.
>
> In your remarks, you have referred to the time when you served with forces of this country for the realization of a common ideal. It is gratifying indeed that you are to cooperate with us now in the furtherance of our common desire for better understanding and mutual aid. You can count upon the ready support of this government in your efforts to that end.
>
> I have not failed to note the hope expressed by you, on behalf of His Excellency President Zayas, that the friendly advice which has been given to him from time to time by this government be continued. I take this opportunity to assure you that this government, as ever, entertains the highest solicitude for the welfare of Cuba. It will gladly continue to be of service by means of the friendly counsel and advice which has invariably been given with a view to assisting the Cuban people to maintain an independent existence and to discharge their international obligations.

It will not escape notice that Secretary Hughes' address on the centenary of the Monroe Doctrine (a portion of which is quoted in another editorial comment in this number) has already made its way to the Latin American countries, and that His Excellency the Cuban Ambassador, in his first official appearance in the United States laid great stress upon this statement of Secretary Hughes. Apparently, the two governments are in complete accord upon the principle of equality, and upon the extent to which this principle must obtain in international relations—at least in the relation between the American republics, if they are to be considered international. In reality, they are American, based upon the common principles of justice, mutual respect, and a desire to contribute to each other's advancement.

That General Crowder's tenure of office as Ambassador to Cuba may meet with the approval of the Cuban people, and that Mr. Torriente's tenure of office may meet with the approval of the United States is assuredly the desire of the friends of these free, sovereign and independent republics.

JAMES BROWN SCOTT.

CURRENT NOTES

SUPREME COURT DECISIONS IN ALIEN LAND LAW CASES

On November 12, 1923, the Supreme Court of the United States handed down the following decisions, Terrace et al. *v.* Thompson; Porterfield and Mizuno *v.* Webb and Woolwine; and on the 19th of the same month, U. S. Webb, as Attorney General of California, and C. C. Coolidge, as District Attorney of Santa Clara County, Appellants, *v.* J. J. O'Brien and J. Inouye; and Raymond L. Frick and N. Satow, Appellants, *v.* U. S. Webb, as Attorney General of California, and Matthew Brade, as District Attorney of the City and County of San Francisco.

The leading case, or rather the one in which Mr. Justice Butler, speaking for the court, delivered a carefully reasoned and elaborate opinion, decided the four; each was on appeal before the Supreme Court from a District Court of the United States. The Terrace case arose under the Constitution and the laws of the State of Washington, the other cases under the laws of California. These four cases, as decided in the District Courts, were the subject of an editorial comment in the Journal for July, 1922 (pp. 420–423). The facts in each are similar. Japanese sought to lease agricultural land and to carry on the business of farming. The laws of Washington and California forbade this. The appellants contended that they were entitled to the right under the treaty with Japan, and that the laws of the States were unconstitutional for a variety of reasons. The Supreme Court declared that the laws were not unconstitutional. It also decided that Article I of the Treaty of 1911 with Japan only gave, so far as the present case was concerned, "the right to 'carry on trade' or 'to own or lease and occupy houses, manufactories, warehouses and ships', or 'to lease land for residential and commercial purposes' " and that this clause did not convey the right to lease for agricultural purposes. Mr. Justice Butler also showed that, according to the desire of Japan, this right was struck from a proposed draft of the treaty, in which Japanese subjects were to have the right "to lease land for residential, commercial, industrial, manufacturing and other lawful purposes."

In view of the fact that the four cases have been discussed in the editorial comment referred to, and that the Terrace case of Washington, and the Porterfield case of California, will be printed in an early number of the JOURNAL, it does not seem to be necessary to consider them in detail.

APPOINTMENT OF DELEGATES TO THE INTERNATIONAL COMMISSION OF JURISTS[1]

Three governments have communicated to the Pan American Union the names of their representatives on the International Commission of Jurists, in accordance with the provisions of a resolution adopted by the Fifth International Conference of American States, held at Santiago, Chile, in March and April last. The Government of Guatemala has named Sr. Lic. don Antonio Batres and Sr. Dr. don José Matos; the delegates of Panama are Sr. Dr. Eusebio A. Morales and Sr. Dr. Horacio F. Alfaro, while the United States will be represented on the Commission by Dr. James Brown Scott and Prof. Jesse S. Reeves. All are prominent in the affairs of their respective countries, and have held positions of trust and responsibility.

Dr. Batres and Dr. Matos were the two Guatemalan delegates to the International Commission of Jurists which met in 1912. Dr. Batres was also the Guatemalan delegate to the Third International Conference of American States, has served as Minister at Washington, and has occupied the posts of Minister of Foreign Relations, of Public Instruction, and of Government. Dr. Matos has served as Secretary of the Guatemalan Legations at Madrid and Mexico City, as Sub-Secretary of Foreign Relations, and was a delegate to the Second Pan American Scientific Congress.

Dr. Eusebio A. Morales has served his country in many important capacities, including that of Minister to the United States, and during the administration of President Valdes served as Secretary of Government and Justice. Dr. Alfaro, a graduate of the University of Cartagena, served for some years as a member of the judiciary. In 1907 he was sent on a special diplomatic mission to Colombia, and in 1908 became Secretary of Foreign Affairs of Panama.

Of the two United States delegates, Dr. Scott, as President of the American Institute of International Law and Secretary of the Carnegie Endowment for International Peace, has long been prominent in the field of international affairs. He was a delegate to the Second Hague Conference in 1907, a technical delegate to the Paris Peace Conference in 1919, and served as legal adviser to the Conference on Limitation of Armament, held at Washington in 1921. Prof. Reeves is Professor of Political Science at the University of Michigan, Associate Editor of the "American Journal of International Law," as well as a member of the Society, and is also a member of the American Political Science Association.

The commission, which is to meet at Rio de Janeiro in 1925, on the date to be determined by the Governing Board of the Pan American Union in agreement with the Government of Brazil, was originally created by the Third International Conference of American States, which adopted a convention providing for an International Commission of Jurists to prepare a draft of a code of private international law and one of public international law. The commission met at Rio de Janeiro from June 26 to July 12, 1912. Although the convention called for one delegate from each country, the

[1] Press notice of the Pan-American Union, November 15, 1923.

Governing Board of the Pan American Union in fixing the date of meeting, provided for the appointment of two delegates from each country, each delegation, however, having but a single vote. The following countries, sixteen in all, sent official delegations: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, Salvador, United States, Uruguay, and Venezuela.

Six distinct committees were organized at the first meeting of the commission to meet in different capitals of the American republics, to consider the following phases of international law: (1) Maritime war and the rights and duties of neutrals; (2) War on land, civil war and claims of foreigners growing out of such wars; (3) International law in time of peace; (4) Pacific settlement of international disputes and the organization of international tribunals; (5) Status of aliens, domestic relations and successions; (6) Matters of private international law not embraced in the previous enumeration, and including the conflict of penal laws.

Two committees were then appointed to report at once upon a tentative draft of two conventions covering extradition and the execution of foreign judgments. The committee on the convention on extradition made a full report, which was discussed and, in slightly amended form, approved by the Congress. No action, however, has been taken thereon by any of the governments represented at the conference. In considering the convention on the execution of foreign judgments, it was decided to refer the question to one of the special committees.

The commission then adjourned to meet again in 1914, but owing to the outbreak of the European War this meeting never took place. Of the special committees appointed only that named to consider the status of aliens, domestic relations and successions held a meeting, but as the commission itself failed to meet in 1914, it was impossible for this committee to present its report.

With the object of continuing the work started in 1912, the Fifth International Conference of American States adopted a resolution reorganizing the commission, and requesting each government of the American republics to appoint thereon two delegates. In addition to the program mapped out in 1912, the commission has been entrusted by the Santiago Conference with a number of additional functions, among them consideration of the status of children of foreigners born within the jurisdiction of any of the American republics; the rights of aliens resident within the jurisdiction of any of these republics; and the study of the project submitted by the Costa Rican delegation to the Fifth International Conference of American States for the creation of a Permanent American Court of Justice. The resolutions of the commission will be submitted to the Sixth International Conference of American States, to meet at Havana, Cuba, in order that, if approved, they may be communicated to the respective governments and incorporated in conventions.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 15–NOVEMBER 15, 1923

(With reference to earlier events not previously noted.)

WITH REFERENCES

Abbreviations; *Adv. of peace*, Advocate of peace; *B. I. I. I.*, Bulletin de l'Institut Intermediaire International; *Bd. of trade J.*, Board of Trade Journal (London); *Bundesbl.*, Switzerland, Bundesblatt; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Costa Rica, Ga.*, La Gaceta; *Cur. Hist.*, Current History (New York Times); *D. O.*, Diario oficial (Brazil); *E. G.*, Eidgenocheiss gesetzsammlung (Switzerland); *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *Evening Star* (Washington); *G. B. Treaty series*, Great Britain, Treaty series; *Ga. de Madrid*, Gaceta de Madrid; *G. U.*, Gazetta Ufficiale (Italy); *Guatemalteco*, El. Guatemalteco; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty series; *Lond. Ga.*, London Gazette; *Monit.*, Moniteur Belge; *Nation (N. Y.)*; *N. Y. Times*, New York Times; *Naval Inst. Proc.*, U. S. Naval Institute Proceedings; *P. A. U.*, Pan American Union Bulletin; *Press Notice*, U. S. State Dept. Press Notice; *Proclamation*, U. S. State Dept. Proclamation; *R. G. D. I. P.*, Revue Générale de Droit International Public; *Reichs G.*, Reichs-Gesetzblatt (Germany); *Rev. int. de la Croix-Rouge*, Revue international de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

May, 1923

12 EGYPT—PERSIA. Provisional commercial agreement concluded by exchange of notes. *Commerce reports*, Nov. 5, 1923, p. 385.

June, 1923

28 BELGIUM—DENMARK. Agreement concerning aerial navigation signed at Copenhagen. *Monit.*, Oct. 21, 1923, p. 5145.

29 BELGIUM—LUXEMBURG. Concluded special convention in execution of Article 22 of the Madrid Postal Convention of Nov. 30, 1920 and Article 13 of the Arrangement concerning registered mail. Text: *Monit.*, Sept. 1, 1923, p. 4343.

July, 1923

17 *to Oct. 7* TANGIER CONFERENCE. Conference of experts representing Great Britain, France and Spain adjourned on July 17, and resumed sessions on Aug. 22. On Oct. 7 negotiations were suspended. *Cur. Hist.*, Nov. 1923, *19*: 332. Session which was to have been held in Paris, Oct. 22, adjourned, following demand of Italy for

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admission by her delegates. On Oct. 23, the U. S. State Department published text of note to British, French and Spanish governments reiterating its request for maintenance of principle of open door in Tangier settlement. Date for reassembling of conference fixed for Oct. 27. *Cur. Hist.*, Dec. 1923, *19*: 504.

21 AUSTRIA—PORTUGAL. Commercial treaty signed, effective Aug. 1, 1923. *D. G.*, July 31, 1923. *Commerce reports*, Oct. 1, 1923, p. 55.

23 POLAND—TURKEY. Treaties signed at Lausanne: (1) Commercial agreement, containing "most-favored-nation" clause; (2) Agreement covering settlement of citizens of one country in territory of the other, by which equality of rights is guaranteed; (3) Treaty of friendship. *Commerce reports*, Oct. 1, 1923, p. 55.

24 FRANCE—GREAT BRITAIN. Notes exchanged between British and French delegates at Lausanne regarding concessions in territories detached from Turkey and Article 34 of Treaty of Lausanne of July 24, 1923 (Egyptian nationality). *G. B. Treaty series*, no. 17–18 (1923). Cmd. 1946–1947.

24 POLAND—TURKEY. Subsidiary treaty signed at Lausanne. *Cur. Hist.*, Dec. 1923, *19*: 88.

27 PAN AMERICAN COMMISSION OF CHILE. Organized by Presidential decree, in conformity with provisions of Article IV of resolutions concerning the Pan American Union, approved by the Fifth International Conference of American states. Text: *P. A. U.*, Dec. 1923, p. 550.

August, 1923

4 AFGHANISTAN—GREAT BRITAIN. Ratifications exchanged at London of trade convention of June 5, 1923. *G. B. Treaty series*, no. 21 (1923). Cmd. 1977.

8 *to Sept. 21* FIUME QUESTION. Premier Mussolini of Italy on Aug. 8 informed Yugoslav delegation of the Mixed Commission in Rome that Italy would consider herself free to resume full liberty of action unless agreement was reached by Aug. 31. *N. Y. Times*, Aug. 25, 1923, p. 3. On Aug. 31, Mixed Commission reached agreement whereby Fiume should be administered by Mixed Commission, on which Italy, Yugoslavia and Free State of Fiume should be represented. *N. Y. Times*, Sept. 8, 1923, p. 3. On Sept. 12 and 15 the Treaty of Rapallo of 1920 and the Agreement of Santa Margharita of 1922 were filed with the League of Nations by Yugoslavia and Italy. *N. Y. Times*, Sept. 16, 1923, p. 4. On Sept. 16, the Fiume government resigned and General Giardino of

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Italian army was appointed Military Governor. *N. Y. Times*, Sept. 17, 1923, p. 1. On Sept. 21, Yugoslav government replied to latest Italian proposal providing for annexation by Italy of Italian part of Fiume and by Yugoslavia of the Slav section and for running the governments of Fiume and Porto Barras as a single entity, under Mixed Commission. *N. Y. Times*, Sept. 22, 1923, p. 4.

14 BELGIAN LUXEMBURG ECONOMIC UNION—POLAND. Commercial treaty of Dec. 30, 1922 ordered promulgated in Belgium. *Monit.*, Oct. 4, 1923, p. 4894.

14 GREAT BRITAIN—ITALY. Arbitration agreement of Feb. 1, 1904 renewed for five years by exchange of notes. Text: *G. B. Treaty series*, no. 22, 1923. Cmd. 1878.

15–17 INTERNATIONAL MARITIME CONFERENCE. Held at Gothenburg with nine countries represented. Text of resolutions: *L. N. Q. B.*, Oct. 1923, p. 192.

15–18 INTERPARLIAMENTARY UNION. Twenty-first conference held in Copenhagen. *Bul. interparl.*, July–Aug. 1923. *Cur. Hist.*, Oct. 1923, *19*: 158.

16 RIGA CONFERENCE. Esthonia, Latvia and Finland concluded conference on cooperation in matters affecting extradition of criminals, passport regulations, policy toward Soviet Russia, etc. *Cur. Hist.*, Oct. 1923, *19*: 159.

17 CZECHOSLOVAKIA—FRANCE. Commercial treaty signed at Paris. *Ga. de Prague*, Aug. 22, 1923, p. 3. Text: *J. O.*, Aug. 31, 1923, p. 8518.

17 *to Nov. 12* PERMANENT COURT OF INTERNATIONAL JUSTICE. On Aug. 17, rendered judgment in S. S. *Wimbledon* case to the effect that Germany was at fault in closing Kiel Canal. *L. N. M. S.*, Sept. 1923, p. 163. On Sept. 10, delivered advisory opinion in favor of Germany on question concerning rights of German settlers in Poland. On Sept. 15, gave advisory opinion on question regarding interpretation of Article 4 of Polish minorities treaty, declaring competence of League of Nations to deal with the question. *L. N. M. S.*, Oct. 1923, pp. 190–192. *Cur. Hist.*, Oct. 1923, *19*: 150. On Nov. 12, the court met in extraordinary session to discuss delimitation of frontier between Poland and Czechoslovakia. *N. Y. Times*, Nov. 18, 1923, p. 2. *L. N. M. S.*, Nov. 1923, p. 243.

20 *to Oct. 23* GERMAN REPARATIONS. Reply of France of Aug. 20 to British note of Aug. 11 published as Yellow Book on Aug. 22. Text: *N. Y. Times*, Aug. 23, 1923, p. 1. *Europe*, Sept. 1, 1923,

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p. 1104. *Cur. Hist.*, Oct. 1923, *19*: 61. Belgian reply delivered to British ambassador on Aug. 27. Text: *Times*, Aug. 29, 1923, p. 6. *Europe*, Sept. 1, 1923, p. 1121. On Sept. 26, President Ebert of Germany issued formal proclamation announcing end of passive resistance in the Ruhr. Text: *N. Y. Times*, Sept. 27, 1923, p. 2. *Nation* (*N. Y.*), Nov. 14, 1923, p. 565. On Oct. 12, German government announced that payments to Ruhr unemployed would be discontinued after Nov. 17. Agreement reached between miners' unions and French authorities for resumption of work at certain mines. The German government, on Oct. 16, renewed its request for cooperation of France, Belgium and Germany in restoration of industrial operations in Ruhr, but Poincaré rejected it. *Cur. Hist.*, Dec. 1923, *19*: 360. *N. Y. Times*, Oct. 18, 1923, p. 1. New German note sent to Reparation Commission on Oct. 23, declaring inability to make deliveries in kind and asking examination of Germany's capacity to pay. Text: *N. Y. Times*, Oct. 25, 1923, p. 3. *Cur. Hist.*, Dec. 1923, *19*: 367.

22 GREAT BRITAIN—SOVIET RUSSIA. Chicherin sent note to British agent in Moscow in protest against raising of British flag on the Isle of Wrangel as violation of Russian sovereign rights. *Russian information*, Sept. 1, 1923, p. 131.

22 NETHERLANDS—PORTUGAL. Commercial treaty signed, replacing commercial declaration denounced by Portugal on April 1. *Commerce reports*, Oct. 1, 1923, p. 55. Regulations: *Staatscourant*, Sept. 13, 1923, no. 177.

23 CHESTER CONCESSIONS. Arbitrators appointed under New York arbitration law handed down decision that Colby M. Chester and his associates are to receive $300,000 and 10 per cent of the net profits from the Ottoman Development Company for work performed in Turkey and concessions obtained by them. They are to withdraw from management of the company and turn over to Kennedy interests all papers of Ottoman American Exploration Company. *N. Y. Times*, Aug. 30, 1923, p. 1 *Cur. Hist.*, Oct. 1923, *19*: 176.

23 JAPAN—UNITED STATES. Treaty of arbitration of May 5, 1908 renewed for another period of five years. *Press notice*, Aug. 23, 1923. *N. Y. Times*, Aug. 24, 1923, p. 4.

26 AUSTRIA—BELGIUM. Temporary commercial agreement concluded on basis of most-favored-nation treatment. *Monit.*, Aug. 26, 1923, p. 4222.

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26 DENMARK—LITHUANIA. Temporary agreement regulating commercial and shipping relations on basis of most-favored-nation treatment, arranged by exchange of notes. *Commerce reports*, Oct. 29, 1923, p. 313.

27 *to Sept. 29* · GREECE—ITALY. On Aug. 27, General Tellini of Italy, president of the International Delimitation Commission, and four members of his suite, were murdered near Janina. Italy issued ultimatum to Greece on Aug. 29, part of which Greece accepted on Aug. 30, but rejected indemnity demand. Council of Ambassadors ordered Greece to investigate crime. On Aug. 31, Italian fleet bombarded Corfu and occupied the island. Italy made new demands and sent communication to the Powers. On Sept. 1 Greece appealed to League of Nations under Article 15, of the Covenant. Italy denied League's right to interfere. League Council discussed the matter and exchanged views with Conference of Ambassadors. On Sept. 7, Ambassadors sent note to Greece embodying nearly same terms as Italy's original demands. Terms accepted by Greece, without reservation. Italy also accepted terms and agreed to evacuate Corfu and other islands when Greece had satisfied Italy's demands for reparations. *Cur. Hist.*, Oct. 1923, *19*: 148. Communiqués issued by Ambassadors' Council on Sept. 9 and 26. Texts: *Times*, Sept. 10 and 27, 1923. On Sept. 27, Corfu was evacuated. On Sept. 29, Greek government instructed Swiss National Bank to pay reparations demanded to Italy. *Cur. Hist.*, Nov. 1923, *19*: 329. *L. N. M. S.*, Oct. 1923, p. 212.

29 FRANCE—GREAT BRITAIN. Arbitration convention renewed for five years. *G. B. Treaty series*, no. 20, 1923. Cmd. 1960.

31 MEXICO—UNITED STATES. Full diplomatic relations restored. *N. Y. Times*, Sept. 1, 1923, p. 1. *Press notice*, Aug. 31, 1923. *Cur. Hist.*, Oct. 1923, *19*: 168.

31 *to Sept. 29* LEAGUE OF NATIONS COUNCIL. Held 26th session at Geneva for consideration of Italo-Greek conflict over Corfu, Czechoslovak-Polish boundary question, minorities, reconstruction of Hungary, etc. On Aug. 31 decision reached to hold every year four regular sessions opening on Mondays preceding or falling on Dec. 10, Mar. 10, June 10 and on the third day before the Assembly. *L. N. M. S.*, Oct. 1923, pp. 186 and 195.

31 *to Sept. 12* OBSCENE PUBLICATIONS CONFERENCE. New convention was drawn up and signed by twenty-nine states at conference in Geneva. *L. N. M. S.*, Oct. 1923, p. 220. *L. N. O. J.*, Oct. 1923, 1151.

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2 POLAND—SOVIET RUSSIA. Poland sent note to Soviet government stating her readiness to recognize Soviet Federation provided all republics in the Union would observe conditions guaranteed by Riga treaty. *Cur. Hist.*, Oct. 1923, *19*: 171.

3–29 LEAGUE OF NATIONS ASSEMBLY. Fourth session held at Geneva, with forty-seven states (members) represented at the outset and two new members, Irish Free State and Abyssinia admitted in course of session. Elected M. Pessoa judge of Permanent Court of International Justice to succeed Judge Barbosa. Decided to ask Council to communicate draft treaty of mutual assistance to all governments for their opinion. Elected six non-permanent members of the Council (Uruguay, Brazil, Belgium, Sweden, Czechoslovakia, Spain). Draft amendment to Art. 10, submitted by Canadian government at first Assembly, was not adopted, one member, Persia, voting against it and thirteen abstaining from voting. Text of resolutions and treaty of mutual assistance. *L. N. M. S.*, Oct. 1923.

4 FRANCE—POLAND. Treaty of Feb. 6, 1922 relating to petroleum industry, of which ratifications were exchanged on Aug. 2, promulgated in France. Text: *J. O.*, Sept. 7, 1923, p. 8775.

4 FRANCE—SAAR TERRITORY. France promulgated convention signed at Paris, July 5, 1922, relating to avoidance of additional taxes, of which ratifications were exchanged on Aug. 10, 1923. Text: *J. O.*, Sept. 7, 1923, p. 8775.

5 CANADA—FRANCE. Ratifications exchanged of commercial treaty of Dec. 15, 1922. Text: *J. O.*, Sept. 28, 1923, p. 9402. *G. B. Treaty series*, no. 25 (1923). Cmd. 1985.

5 PORTUGAL—UNITED STATES. Treaty of arbitration renewed for five years, with provision for submission of disputes to Permanent Court of International Justice if United States joins it. *Press notice*, Sept. 5, 1923.

5–21 AUSTRIA—NETHERLANDS. Commercial treaty of March 26, 1867 revived by exchange of notes. *Commerce reports*, Dec. 3, 1923, p. 640.

6 INTERNATIONAL LEAGUE FOR PROTECTION OF ABORIGINES. Seven countries represented in conference at Geneva. *L. N. Q. B.*, Oct. 1923, p. 201.

7 CZECHOSLOVAKIA—GREAT BRITAIN. Ratifications exchanged at Prague of agreement signed Jan 31, 1923, respecting commercial travelers' samples. *G. B. Treaty series*, no. 19, 1923. Cmd. 1958.

September, 1923

8 FRANCE—NETHERLANDS. Aerial navigation arrangement signed at Paris, July 2, 1923, of which ratifications were exchanged on Sept. 3, promulgated in France. *J. O.*, Sept. 11, 1923, p. 8920.

8 FRANCE—POLAND. Treaty concerning property rights and interests, signed Feb. 6, 1922, of which ratifications were exchanged on Aug. 2, promulgated in France. Text: *J. O.*, Sept. 11, 1923, p. 8918.

8 INTERNATIONAL POLICE CONGRESS. Closed at Vienna, after agreeing to establish an international criminal police commission in Vienna as preliminary to creation of an international police bureau in principal countries of the world. *Wash. Post*, Sept. 9, 1923, p. 6.

8 IRISH FREE STATE. Admitted to League of Nations. *Wash. Post*, Sept. 9, 1923, p. 3. *N. Y. Times*, Sept. 11, 1923, p. 19. *L. N. M. S.*, Oct. 1923, p. 196.

8 MEXICO—UNITED STATES. General claims convention for settlement of all claims of both countries arising since the signing of the claims convention of July 4, 1868 (not including claims embraced within terms of a special claims convention relating to losses through revolutionary acts) was signed in Mexico City and a special claims convention was signed in Washington. *Press notice*, Sept. 8, 1923. *N. Y. Times*, Sept. 9, 1923, p. 4.

11 MEXICO—UNITED STATES. Revolutionary claims convention framed at prerecognition conference, signed at Mexico City, providing for Mixed Commission to settle American claims for damages suffered in consequence of revolution, Nov. 20, 1910–May 30, 1920. *Wash. Post*, Sept. 12, 1923, p. 4. *N. Y. Times*, Sept. 12, 1923, p. 30.

12 RHODESIA, SOUTHERN. Incorporated as dominion of British Empire. First governor, Sir John Chancellor. *Times*, Sept. 13, 1923, p. 10.

17–18 INTERNATIONAL PEACE BUREAU. General assembly of Peace Societies held at Basle, with eleven countries represented. Text of resolutions: *L. N. Q. B.*, Oct. 1923, p. 205.

18 CZECHOSLOVAKIA—FRANCE. Treaty relating to questions of property rights and interests signed Jan. 18, 1921, of which ratifications were exchanged on May 24, 1922, promulgated in France. Text: *J. O.*, Sept. 21, 1923, p. 9234.

27 ARMS TRAFFIC CONVENTION. Informal reply of United States of Sept. 12 to League of Nations communication dated May 1, 1923, requesting views relating to the convention, made public. *Press notice*, Sept. 27, 1923. *Wash. Post*, Sept. 28, 1923, p. 5.

September, 1923

28 ETHIOPIA (ABYSSINIA). Admitted to League of Nations. *L. N. M. S.*, Oct. 1923, p. 196.

29 FRANCE—GREAT BRITAIN. Declaration signed at Paris concerning oyster fisheries outside territorial waters. Text: *J. O.*, Sept. 30, 1923, p. 9506. *G. B. Treaty series*, no. 31 (1923). Cmd. 1996.

October, 1923

1 IMPERIAL CONFERENCE. British imperial conference opened in London on Oct. 1 and Imperial economic conference on Oct. 2. *Cur. Hist.*, Nov. 1923, *19*: 320. *Times*, Oct. 2–3, 1923, p. 12. Official summary: *Times*, Nov. 12, 1923. Cmd. 1987.

2 AUSTRIA—JAPAN. Commercial treaty on basis of most-favored-nation treatment concluded by exchange of notes. *Commerce reports*, Nov. 19, 1923, p. 515.

2 CONSTANTINOPLE. Allied occupation ended. *N. Y. Times*, Oct. 3, 1923, p. 4.

3 CHINESE BANDITS. Dean of Diplomatic Corps in Peking delivered reply of governments involved in Lincheng incident to note of Sept. 24 of Chinese Foreign Office. Text: *Press notice*, Oct. 6, 1923, *N. Y. Times*, Oct. 5, 1923, p. 3.

4 BELGIUM—POLAND. Commercial treaty of Dec. 30, 1922, came into force. Text: *Monit.*, Oct. 4, 1923, p. 4900. *Commerce reports*, Nov. 12, 1923, p. 451.

4 CZECHOSLOVAKIA—NORWAY. Commercial treaty signed at Prague on basis of most-favored-nation treatment. *Temps*, Oct. 5, 1923, p. 1.

4 INTERNATIONAL LAW ASSOCIATION. Thirty-second conference opened in London. *N. Y. Times*, Oct. 5, 1923, p. 19. *Times*, Oct. 5, 1923, p. 6.

6–10 MARITIME LAW CONFERENCE. Diplomatic conference held at Brussels to consider conventions adopted at 1922 conference. *Droit maritime français*, Oct. 18, 1923, p. 397.

10 CHINA CONSTITUTION. Promulgated by Chinese Parliament. *China Weekly Review*, Oct. 20, 1923, p. 269.

10 *to Nov. 10* FRANCE—SWITZERLAND. Note sent by France to Switzerland concerning Savoy free zones, announced that on Nov. 20, French customs would be established at Swiss frontier. On Oct. 17, Swiss Federal Council, in note to France, repudiated any evasion of obligations and proposed referring dispute to International Court of Justice. On Nov. 10, France advanced customs line to Swiss frontier. *Cur. Hist.*, Dec. 1923, *19:* 506.

October, 1923

10 PEASANT CONFERENCE. First International Peasant Conference, with object of creating world-wide peasant farmers' body, opened in Moscow with one hundred delegates from forty countries, including the United States, Argentina and Mexico. *Cur. Hist.*, Nov.–Dec. 1923, *19:* 336, 507.

11 PALESTINE. Sir Herbert Samuel, British High Commissioner, proposed to set up an Arab agency, parallel to Jewish agency authorized by the mandate, to cooperate with administration in matters affecting Arab interests, but the Arabs rejected the plan. *Cur. Hist.*, Dec. 1923, *19:* 514.

12 *to Nov. 7* ECONOMIC CONFERENCE ON GERMANY'S CAPACITY TO PAY. On Oct. 13 British chargé d'affaires at Washington transmitted cablegram of Lord Curzon, of Oct. 12, requesting cooperation of United States in allied conference to determine amount of reparations Germany can pay. Secretary Hughes replied on Oct. 15 agreeing to appointment of international advisory commission of experts to make economic inquiry, with certain restrictions. Texts: *Press notice*, Oct. 25, 1923. *N. Y. Times*, Oct. 26, 1923, p. 1. *Times*, Oct. 26, 1923, p. 12. *Cur. Hist.*, Dec. 1923, *19:* 367. On Oct. 28, communiqué issued at French Foreign Office gave that government's conception of proposed plan and Poincaré stated views in speech at Sampigny. *N. Y. Times*, Oct. 29, 1923, p. 1. Text of Communiqué: *Times*, Oct. 29, 1923, p. 12. Announced on Oct. 30 that acceptances to British proposal had been received from France, Belgium and Italy. *N. Y. Times*, Oct. 31, 1923, p. 1. On Nov. 3, Poincaré cabled explanations of French stand. Summary: *N. Y. Times*, Nov. 4 and 7, 1923, p. 1. On Nov. 7, Secretary Hughes advised Poincaré through Ambassador Jusserand that restrictions insisted upon by France would frustrate the object of the Washington government in offering its cooperation in inquiry plan. *N. Y. Times*, Nov. 8, 1923, p. 1.

13 BELGIAN REPARATION PLAN. Belgian government invited French, British and Italian governments to refer to the Reparation Commission the plan submitted by Belgium to Allied governments on June 6, 1923. *Wash. Post*, Oct. 14, 1923, p. 4. *Cur. Hist.*, Dec. 1923, *19:* 362.

15 *to Nov. 3* CUSTOMS CONFERENCE. Held at Geneva. Text of official instruments: *League of Nations*, C. D. 1, 96 (1) 1923. *N. Y. Times*, Nov. 4, 1923, p. 8. *L. N. M. S.*, Nov. 1923, p. 241.

15 SPAIN—UNITED STATES. Present commercial treaty extended for six months from Nov. 6, 1923. *Commerce reports*, Oct. 29, 1923, p. 313.

October, 1923

16 LEAGUE OF NATIONS COVENANT. Membership of special commission of jurists to report to Council on legal interpretation of the Covenant announced by Secretariat. Commission consists of M. Adachi of Japan, Juan Antonio Buero of Uruguay, Henri Fromageot of France, Vittorio Orlando Ricci of Italy, M. Unden of Sweden, Señor Villa Urrutria of Spain, Charles de Visscher of Belgium, and Dr. J. A. van Hamel of Holland, director of Judicial Bureau of the League. *Cur. Hist.*, Dec. 1923, *19:* 496. *N. Y. Times*, Oct. 17, 1923, p. 2.

16 POLAND—TURKEY. Perpetual treaty of peace approved by Polish cabinet. *Wash. Post*, Oct. 17, 1923, p. 1.

17 HUNGARIAN RECONSTRUCTION. Reparation Commission sanctioned a twenty-year moratorium for Hungarian reparation payments and invited League of Nations to frame plan for reconstruction similar to that for Austria. *Cur. Hist.*, Dec. 1923, *19:* 510.

18 AUSTRIA—SOVIET REPUBLICS. By exchange of notes, the commercial agreement of Dec. 7, 1921 between Austria and Russia will henceforward be applied in the following republics: The Russian Federative Socialist Soviet Republic, the Ukrainian Socialist Federative Soviet Republic, the White Russian Socialist Federative Republic and the Transcaucasian Socialist Federative Soviet Republic. *Commerce reports*, Dec. 3, 1923, p. 640.

18 BAVARIA—SAXONY. Diplomatic relations severed. *N. Y. Times*, Oct. 19, 1923 p. 1.

18 BRAZIL—UNITED STATES. Commercial agreement reached by exchange of notes, according mutual most-favored-nation treatment. *N. Y. Times*, Oct. 19, 1923, p. 6. *U. S. Treaty series, no.* 672.

18 COSTA RICA—GREAT BRITAIN. Chief Justice Taft rendered award in favor of Costa Rica in Amory oil concessions and Royal Bank of Canada cases. *Wash. Post.* Oct. 21, 1923, Edit. sect., p. 2.

18 SALVADOR LOAN. Secretary Hughes issued a statement concerning the loan arranged on Oct. 9 between government of Salvador and the banking house of F. J. Lisman of New York. *Press notice*, Oct. 18, 1923. *Cur. Hist.*, Dec. 1923, *19:* 520.

20 OTTOMAN—AMERICAN DEVELOPMENT COMPANY. Announced in New York organization plans for fifteen concession developing companies to build railroads and ports and develop mines, water power, etc. *Cur. Hist.*, Dec. 1923, *19:* 513.

21 RHINELAND SEPARATIST MOVEMENT. Rhineland Republic proclaimed at Aix-la-Chapelle on Oct. 21 and other towns occupied

October, 1923

from Oct. 13–27. Text of proclamation: *Times*, Oct. 24, 1923, p. 14. On Oct. 29, the Republic issued a greeting to the world: Text: *N. Y. Times*, Oct. 30, 1923, p. 1. On Oct. 31, Great Britain informed Belgium and France that legality of provisional governments within the occupied territory was not recognized. *N. Y. Times*, Nov. 1, 1923, p. 3. M. Poincaré replied on Nov. 2, declaring Treaty of Versailles was not involved. *Cur. Hist.*, Dec. 1923, *19:* 366. On Nov. 9 and 14, notes were exchanged between France and Great Britain relative to effect Separatist movement would have on the Treaty. *N. Y. Times*, Nov. 15, 1923, p. 2.

22–29 INTERNATIONAL LABOR CONFERENCE. Fifth session held at Geneva. *I. L. O. B.*, Nov. 7, 1923, p. 183. *Cur. Hist.*, Dec. 1923, *19:* 486.

27 TURKISH REPUBLIC. National Assembly at Angora voted establishment of a republic. Mustapha Kemal Pasha elected President. *N. Y. Times*, Oct. 30, 1923, p. 1, *Cur. Hist.*, Dec. 1923, *19:* 512. *Press notice*, Nov. 1, 1923.

28 MOSUL QUESTION. Announced in Constantinople that British had requested the Turks to begin discussion of question left unsettled at Lausanne. *Cur. Hist.*, Dec. 1923, *19:* 512.

29 CZECHOSLOVAKIA—UNITED STATES. Reciprocal most-favored-nation treatment effected by exchange of notes. *Commerce reports*, Nov. 26, 1923, p. 576.

29–30 RHINE ARMY COST AGREEMENT. Text of agreement, as signed, and text of certain correspondence between Great Britain and the United States relating to the agreement, made public by State Department. *Press notices*, Oct. 29, 1923.

November, 1923

1 IRAK CONSTITUTION. Draft of organic law, or constitution, made public. *Temps*, Nov. 3, 1923, p. 1. Summary: *Times*, Nov. 16, 1923, p. 13.

2 SOVIET REPUBLICS. Over 1,000 delegates elected by local soviets in various states of Russia, assembled at Moscow, voted to call the new republic of Russia "The Union of Soviet Socialist Republics." *C. S. Monitor.* Nov. 15, 1923, p. 5.

5 BULGARIA—SERBIA. Yugoslavia gave Bulgaria 48 hours to apologize for attack on military attaché and demanded reparation. *N. Y. Times*, Nov. 6, 1923, p. 2.

5 GREAT BRITAIN—LATVIA. Ratifications exchanged at London of Treaty of Commerce and Navigation, signed June 22, 1923. Text: *G. B. Treaty series*, no. 30, 1923. Cmd. 1995.

November, 1923

5 MIXED CLAIMS COMMISSION (UNITED STATES AND GERMANY). Announced four decisions determining German liabilities for American claims, including those growing out of Lusitania case. No specific awards in Lusitania case. *Wash. Post.* Nov. 6, 1923, p. 2.

6 MILITARY CONTROL COMMISSION. Allied ambassadors sent note to Germany on Nov. 6 demanding that Commission be permitted to resume work at once, to determine if German armed forces exceed the number laid down in Versailles treaty. *N. Y. Times,* Nov. 7, 1923, p. 1.

8 BAVARIAN REVOLT. Adolph Hitler, General Erich von Ludendorff, and Dr. Gustav von Kahr seized control at Munich and appointed themselves a triumvirate of rulers for the nation. Proclamation issued in Germany on Nov. 9 asking support for national government. Text: *N. Y. Times,* Nov. 9, 1923, p. 1. The revolt came to a sudden end with capture of leaders. *N. Y. Times,* Nov. 10, 1923, p. 1.

8 WORLD PEACE PLAN. World Federation of Education Associations announced conditions for contest for $25,000 prize to be awarded for plan considered most likely to bring to the world the greatest security from war. Rules: *Evening Star,* Nov. 8, 1923, p. 23.

12 CALIFORNIA ALIEN LAND LAW. Declared valid by U. S. Supreme Court. *Wash. Post.,* Nov. 13, 1923, p. 2. *Supreme Court,* no. 26 and 111, Oct. term, 1923.

12 FINLAND—POLAND. Commercial treaty signed at Warsaw. *Temps,* Nov. 13, 1923, p. 1.

12 INTERNATIONAL COMMISSION OF JURISTS. State Department announced appointment of James Brown Scott and Jesse S. Reeves as American delegates to conference on codification of international law to be held in Rio de Janeiro in 1925. *Wash. Post,* Nov. 16, 1923, p. 9.

13 CHILE—PERU. Chile and Peru presented arguments to President Coolidge as arbitrator in Tacna Arica dispute. *N. Y. Times,* Nov. 14, 1923, p. 10.

13 FRANCE—GERMANY. Agreement reached between General Degoutte and German government concerning future status of railroads in occupied territory and establishing *modus vivendi* with state railroads in unoccupied territory. Summary: *N. Y. Times,* Nov. 13, 1923, p. 2.

13 FREDERICK WILLIAM, *ex-crown prince of Germany.* Arrived at Oels, Germany, from exile in Holland. *Wash. Post,* Nov. 14, 1923, p. 1.

November, 1923

15 INTERNATIONAL CONFERENCE ON COMMUNICATIONS AND TRANSIT. Second general conference convened at Geneva, Consul at Geneva acting as observer for United States. *Wash. Post*, Nov. 23, 1923, p. 1.

INTERNATIONAL CONVENTIONS

AERIAL NAVIGATION. Paris, Oct. 13, 1919.
Adhesion:
Uruguay. Sept. 6, 1923. *D. O.* (*Uruguay*), Oct. 1, 1923, núm. 5240.

AERIAL NAVIGATION. Paris, Oct. 13, 1919. Protocol. Paris, May 1, 1920.
Ratifications deposited:
Italy. April 10, 1923. *Monit.*, Aug. 24, 1923, p. 4170.

AGRICULTURAL WORKERS' ASSOCIATIONS. Geneva, Nov. 17, 1921.
Ratification:
Czechoslovakia. Aug. 31, 1923. *I. L. O. B.*, Sept, 12, 1923, p. 105.

ARMS AND AMMUNITION TRADE. Saint Germain-en-Laye, Sept. 10, 1919.
Adhesion:
Uruguay. Sept. 6, 1923. *D. O.* (*Uruguay*), Oct. 1, 1923, núm. 5240.

ELBE NAVIGATION. Dresden, Feb. 22, 1923.
Promulgation:
Belgium. April 7, 1923. *Monit.*, Aug. 30, 1923, p. 4294.

EMPLOYMENT OF CHILDREN AS TRIMMERS AND STOKERS. Geneva, Nov. 11, 1921.
Ratification:
Rumania. Aug. 22, 1923. *I. L. O. B.*, Sept. 12, 1923, p. 106. *L. N. O. J.*, Oct. 1923, p. 1231.

EMPLOYMENT OF CHILDREN IN AGRICULTURE. Geneva, Nov. 16, 1921.
Ratification:
Czechoslovakia. Aug. 31, 1923. *I. L. O. B.*, Sept. 12, 1923, p. 105.

FREEDOM OF TRANSIT. Barcelona, April 20, 1921.
Adhesion:
Malay States. Aug. 22, 1923. *L. N. O. J.*, Oct. 1923, p. 1133.
Ratification:
Latvia. Sept. 29, 1923.
Norway. Sept. 4, 1923.
Rumania. Sept. 5, 1923. *L. N. O. J.*, Oct. 1923, p. 1133.
Ratification deposited:
Czechoslovakia.
Rumania. *L. N. M. S.*, Oct. 1923, p. 199.

GENEVA CONVENTION. Aug. 22, 1864. Revisions.

Adhesion:

Albania. Sept. 13, 1923. *E. G.*, Oct. 10, 1923, p. 311.

HUNGARIAN PEACE TREATY. Trianon, June 4, 1920.

Ratification:

Portugal. Oct. 10, 1923. *J. O.*, Oct. 23, 1923, p. 10110.

INTERNATIONAL EXCHANGE OF DOCUMENTS AND PUBLICATIONS. Brussels, March 15, 1886.

Adhesion:

Dominican Republic. Aug. 17, 1923. *Monit.*, Sept. 12, 1923, p. 4577.

LATIN AMERICAN UNION FOR MEDICAL INSTRUCTION. Montevideo, Feb. 5, 1923.

Adhesion:

Uruguay. Sept. 28, 1923, *D. O.* (*Uruguay*), Oct. 1, 1923, núm. 5240.

LEAGUE OF NATIONS. Covenant. Procotol of Amendments. Geneva, Oct. 3–5, 1921.

Ratification:

Albania. (Art. 4, 6.) *L. N. M. S.*, Nov. 1923, p. 246.

Belgium. (Art. 4, 6, 12, 13, 15, 16, 26.) Sept. 28, 1923.

Brazil. (Art. 4, 6, 12, 13, 15, 16, 26.) July 7, 1923.

France. (Art. 6, 12, 13, 15, 26.) Aug. 2, 1923. *L. N. O. J.*, Oct. 1923, p. 1134.

Italy. (Art. 6.)

Latvia. (Art.6.) *L. N. M. S.*, Oct. 1923, p. 197.

Ratifications deposited:

Czechoslovakia. (Art. 4, 6, 12, 13, 15, 26.) *L. N. M. S.*, Oct. 1923, p. 197.

Esthonia. (Art. 4, 6, 12, 13, 15, 16, 26.) July 7, 1923. *L. N. M. S.*, Oct. 1923, p. 197.

Greece. (Art. 12, 13, 15, 26.) *L. N. M. S.*, Sept. 1923, p. 173.

Great Britain. (Art. 12.) July 5, 1923. *L. N. M. S.*, Aug. 1923, p. 144.

Rumania. (Art. 4, 6, 12, 13, 15, 16, 26.) *L. N. M. S.*, Oct. 1923, p. 197.

MEDICAL EXAMINATION OF YOUNG PERSONS EMPLOYED AT SEA. Geneva, Nov. 10, 1921.

Ratification:

Rumania. Aug. 22, 1923. *I. L. O. B.*, Sept. 12, 1923, p. 106.

MOTOR VEHICLES, INTERNATIONAL CIRCULATION OF. Paris, Oct. 11, 1909.

Notification that convention is binding:

Hungary. July 13, 1923. *E. G.*, Sept. 5, 1923, p. 278.

NAVAL LIMITATIONS TREATY. Washington, Feb. 6, 1922.

Promulgation:

France. Oct. 12, 1923. *J. O.*, Oct. 21, 1923, p. 10079.

NAVIGABLE WATERWAYS CONVENTION AND PROTOCOL. Barcelona, April 20, 1921.

Adhesion:

Malay States. *L. N. M. S.*, Oct. 1923, p. 199.

Ratification deposited:

Norway. *L. N. M. S.*, Oct. 1923, p. 199.

OBSCENE PUBLICATIONS. Paris, May 4, 1910.

Adhesion:

Siam. Sept. 13, 1923. *J. O.*, Sept. 21, 1923, p. 9234. *E. G.*, Oct. 10, 1923, p. 314.

OPIUM CONVENTION, 2D. The Hague, Jan, 23, 1912.

Ratification:

Costa Rica. Aug. 14, 1923. *Commerce reports*, Nov. 19, 1923, p. 515.

PACIFIC POSSESSIONS TREATY AND DECLARATION. Washington, Dec. 13, 1921.

Promulgation:

France. Oct. 6, 1923. *J. O.*, Oct. 21, 1923, p. 10084.

PACIFIC POSSESSIONS TREATY. Supplement. Washington, Feb. 6, 1922.

Promulgation:

France. Oct. 6, 1923. *J. O.*, Oct. 21, 1923, p. 10084.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional clause. Geneva, Dec. 16, 1920.

Signature:

Latvia. *L. N. M. S.*, Oct. 1923, p. 199.

POSTAL CONVENTION. Madrid, Nov. 13, 1920.

Adhesion:

Palestine. Sept. 14, 1922. *E. G.*, Oct. 10, 1923, p. 314.

Ireland. *Monit.*, Oct. 12, 1923, p. 5022.

PROTECTION OF INDUSTRIAL PROPERTY. Paris, March 20, 1883. Revision. Brussels, Dec. 14, 1900; Washington, June 2, 1911.

Adhesion:

Canada. Aug. 21, 1923. *E. G.*, Sept. 5, 1923, p. 267. *Monit.*, Sept. 21, 1923, p. 4713.

RADIOTELEGRAPH CONVENTION. London, July 5, 1912.

Adhesion:

Brunei (British protectorate). Oct. 18, 1923. *Monit.*, Nov. 13, 1923, p. 5449.

Esthonia. July 1, 1923. *E. G.*, Nov. 7, 1923, p. 416.

RIGHT TO A FLAG OF STATES HAVING NO SEA-COAST. Barcelona, April 20, 1921.

Ratification deposited:

Norway. *L. N. M. S.*, Oct. 1923, p. 199.

TURKISH PEACE TREATY. Lausanne, July 24, 1923.
Ratification:
Greece. Aug. 26, 1923. *Times*, Sept. 8, 1923, p. 7. *Cur. Hist.*, Oct. 1923, *19:* 88.

UNIVERSAL POSTAL UNION. Revision. Madrid, Nov. 30, 1920.
Adhesion:
Irish Free State. May 14, 1923. *E. G.*, Sept. 12, 1923, p. 290.
Palestine. *Monit.*, Nov. 1, 1923, p. 5319.
Ratification:
Tripolitania.
Cyrenaica.
Eritrea.
Somaliland (Italian colonies). *Monit.*, Nov. 1, 1923, p. 5319.

WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.
Ratification:
Czechoslovakia. Aug. 31, 1923. *I. L. O. B.*, Sept. 12, 1923, p. 105.
Rumania. Aug. 22, 1923. *I. L. O. B.*, Sept. 12, 1923, p. 106.

WEIGHTS AND MEASURES BUREAU. Paris, May 20, 1875. Revision, Sèvres, Oct. 6, 1921.
Ratifications deposited:
Belgium. July 28, 1923. *E. G.*, Oct. 10, 1923, p. 313.
Norway. Aug. 3, 1923. *Monit.*, Sept. 16, 1923, p. 4645.
United States. Oct. 24, 1923. *U. S. Treaty series*, no. 673.

WHITE LEAD IN PAINT. Geneva, Nov. 19, 1921.
Ratification:
Czechoslovakia. Aug. 31, 1923. *I. L. O. B.*, Sept. 12, 1923, p. 105.

WHITE SLAVE TRADE. Geneva, Sept. 30, 1921.
Ratification:
Rumania. Sept. 5, 1923. *Monit.*, Sept. 22, 1923, p. 4722.
Ratifications deposited:
Czechoslovakia. Sept. 29, 1923. *Monit.*, Nov. 9, 1923, p. 5410.
Netherlands. *Monit.*, Oct. 22–23, 1923, p. 5171.

WHITE SLAVE TRADE. Paris, May 18, 1904.
Adhesion:
Cuba. April 5, 1923. *Monit.*, Oct. 3, 1923, p. 4886. *E. G.*, Oct. 10, 1923, p. 312.

WHITE SLAVE TRADE. Paris, May 4, 1910.
Adhesion:
Cuba. April 5, 1923. *Monit.*, Oct. 3, 1923, p. 4886.

M. ALICE MATTHEWS.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN[1]

Aerial Navigation, Convention for the Regulation of. Paris, Oct. 13, 1919. (Treaty Series, 1923, No. 14.) 2½d.

American debt. Arrangements for funding the British debt to the United States of America. (Cmd. 1912.) 3½d.

Boundary line between Syria and Palestine from the Mediterranean to Ell Hammé. Agreement between H. M. Government and the French Government. (Treaty Series, 1923, No. 13.) 2s. 1d.

Cameroons, West Africa. Reports on the British Sphere, for 1922, with a covering despatch from the acting governor of Nigeria. *Colonial Office.* 2s. 1d.

Commercial relations between the British Empire and Roumania. Notes exchanged between the two governments. (Treaty Series, 1923, No. 15.) 2½d.

Commercial Treaties, Hertslet's. Vol. XXIX, 1923. *Foreign Office.* 33s. 3d.

Ellis Island Immigration Station. Despatch from H. M. Ambassador at Washington. (United States, No. 2, 1923.) 3½d.

Extradition. Order in Council directing that the Extradition Acts shall apply in the cases of Austria, Belgium, France, Hungary, Monaco, Netherlands, Norway, Portugal, Siam, Spain, Sweden, Tunis, and Uruguay, in accordance with existing treaties, as supplemented by convention of May 4, 1910, for the suppression of the White Slave Traffic. July 30, 1923. (S. R. & O. 1923, No. 971.) 1½d.

German Reparation Recovery (No. 1) Order, Aug. 1, 1923. (S. R. & O. 1923, No. 904.) 1½d.

Iraq administration report, Oct. 1920–Mar. 1922. *Colonial Office.* 4s. 2d.

Irish Free State. Correspondence between H. M. Government and Irish Free State relative to Art. 12 of articles of agreement for a treaty between Great Britain and Ireland. (Cmd. 1560.) (Cmd. 1928.) 3½d.

———. Statement of financial position between the British Government and the Irish Free State in 1923–24, with an estimate of the value of certain transferred property. (Cmd. 1930.) 2½d.

League of Nations. Report by British representative on 25th session of the Council. (Misc. No. 4, 1923.) 3½d.

[1] Parliamentary and official publications of Great Britain may be obtained for the amount noted from the Superintendent of Publications, H. M. Stationery Office, Imperial House, Kingsway, London, W. C. 2.

Mannheim Convention of 1868, Accession of Netherlands to modifications introduced by the Treaty of Versailles into the Protocol and additional protocol. Signed at Paris, Jan. 21, 1921, and March 29, 1923. (Treaty Series, 1923, No. 12.) 3½d.

Mixed Arbitral Tribunals. *Recueil des Décisions.* Nos. 25, 26, 27, April, May and June, 1923. (Combined.) 18s. 3d.

Nationality decrees promulgated in Tunis and Morocco (French zone) on Nov. 8, 1921. Notes exchanged between the British and French Governments relative to. (Treaty Series, 1923, No. 11.) 2½d.

Nationality of married women. Report of Select Committee. (H. L. Papers and Bills, 1923, No. 149; H. C. Repts. and Papers, 1923, No. 115.) 2½d.

Palestine administration report, 1922. *Colonial Office.* 1s. 7d.

Reparation Commission. Document VI. Reparation account, relative to the amount of payments to be effected by Germany. Pt. 2. 1s. 1d.

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GEORGE A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

ARBITRATION BETWEEN GREAT BRITAIN AND COSTA RICA

Opinion and Award of William H. Taft, Sole Arbitrator

Washington, D. C., October 18, 1923

This is a proceeding under a treaty of arbitration between Great Britain and Costa Rica. The ratifications of the treaty were exchanged on March 7, 1923. The scope of the questions to be decided is to be gathered from two recitals and Article I of the treaty. The two recitals are as follows:

> Whereas there has arisen between their respective governments a difference as to the application of Law No. 41 of the 21st of August, 1920, to two cases in which British corporations are interested, to wit: to the concession granted by the Aguilar-Amory contract of the 25th June, 1918, of which the "Central Costa Rica Petroleum Company" is owner, and the delivery to the Royal Bank of Canada of 998,000 colones in notes of 1000 colones each in payment of a cheque drawn by the Tinoco administration against the Banco Internacional de Costa Rica, which cheque was deposited in the government's account with the said Royal Bank; and
>
> Whereas the claims and contentions of the two governments in regard to these points have been set forth, on the part of His Britannic Majesty's Government, in the notes which His Britannic Majesty's Minister addressed to the Costa Rican Ministry for Foreign Affairs on the 13th of July and the 8th November, 1921, and in antecedent correspondence; and, on the part of the Costa Rican Government, in their notes in reply relative to the present diplomatic controversy and especially in the Congressional resolution of the 13th December of that same year.

Article I. A single arbitrator, appointed by mutual agreement, taking into consideration existing agreements, the principles of public and international law, and in view of the allegations, documents and evidence which each of the two governments may present to him, shall decide:

1. Whether the demand of His Britannic Majesty's Government is well founded;
2. Or whether on the contrary the Government of Costa Rica is justified in not recognizing the said claims by maintaining the declaration of nullity contained in Law 41.

The arbitrator shall have the necessary jurisdiction to establish procedure and to dictate without any restriction whatsoever other resolutions which may arise as a consequence of the question formulated, and which, in conformity with his judgment, may be necessary or expedient

> to fulfil in a just and honorable manner the purposes of this convention; and he shall determine what one party may owe the other for the expenses of the claim. The arbitrator shall also decide with regard to the payment of the expenses of the arbitration.

A reservation in respect to the foregoing provision was made by the Congress of Costa Rica after the signing of the treaty, and this was accepted by Great Britain, as follows:

> Article 2. The approval given in the preceding article to the treaty is done with the understanding that nothing in the treaty would prevent that Costa Rica shall bring into play all means of defense enumerated in the Congressional resolution on the 13th of December, 1921, to which reference is made in the preamble of the treaty and that the arbitrator shall base his award in all or any of the said means of defense.

In January, 1917, the Government of Costa Rica, under President Alfredo Gonzalez, was overthrown by Frederico Tinoco, the Secretary of War. Gonzalez fled. Tinoco assumed power, called an election, and established a new constitution in June, 1917. His government continued until August, 1919, when Tinoco retired, and left the country. His government fell in September following. After a provisional government under one Barquero, the old constitution was restored and elections held under it. The restored government is a signatory to this treaty of arbitration.

On the 22nd of August, 1922, the Constitutional Congress of the restored Costa Rican Government passed a law known as Law of Nullities No. 41. It invalidated all contracts between the executive power and private persons, made with or without approval of the legislative power between January 27, 1917 and September 2, 1919, covering the period of the Tinoco government. It also nullified the legislative decree No. 12 of the Tinoco government, dated June 28, 1919, authorizing the issue of the fifteen million colones currency notes. The colon is a Costa Rican gold coin or standard nominally equal to forty-six and one-half cents of an American dollar, but it is uncoined and the exchange value of the paper colon actually in circulation is much less. The Nullities Law also invalidated the legislative decree of the Tinoco government of July 8, 1919, authorizing the circulation of notes of the nomination of 1000 colones, and annulled all transactions with such colones bills between holders and the state, directly or indirectly, by means of negotiation or contract, if thereby the holders received value as if they were ordinary bills of current issue.

The claim of Great Britain is that the Royal Bank of Canada and the Central Costa Rica Petroleum Company are Britain corporations whose shares are owned by British subjects; that the Banco Internacional of Costa Rica and the Government of Costa Rica are both indebted to the Royal Bank in the sum of 998,000 colones, evidenced by 998 one thousand colones bills held by the Bank; that the Central Costa Rica Petroleum Company owns, by due assignment, a grant by the Tinoco government in 1918 of the

right to explore for an exploit oil deposits in Costa Rica, and that both the indebtedness and the concession have been annulled without right by the Law of Nullities and should be excepted from its operation. She asks an award that she is entitled on behalf of her subjects to have the claim of the bank paid, and the concession recognized and given effect by the Costa Rican Government.

The Government of Costa Rica denies its liability for the acts or obligations of the Tinoco government and maintains that the Law of Nullities was a legitimate exercise of its legislative governing power. It further denies the validity of such claims on the merits, unaffected by the Law of Nullities.

It is convenient to consider first the general objections to both claims of Great Britain, urged by Costa Rica, and then if such general objections cannot prevail, to consider the merits of each claim and Costa Rica's special defenses to it.

Coming now to the general issues applicable to both claims, Great Britain contends, first, that the Tinoco government was the only government of Costa Rica *de facto* and *de jure* for two years and nine months; that during that time there is no other government disputing its sovereignty, that it was in peaceful administration of the whole country, with the acquiescence of its people.

Second, that the succeeding government could not by legislative decree avoid responsibility for acts of that government affecting British subjects, or appropriate or confiscate rights and property by that government except in violation of international law; that the act of Nullities is as to British interests, therefore itself a nullity, and is to be disregarded, with the consequence that the contracts validly made with the Tinoco government must be performed by the present Costa Rican Government, and that the property which has been invaded or the rights nullified must be restored.

To these contentions the Costa Rican Government answers: First, that the Tinoco government was not a *de facto* or *de jure* government according to the rules of international law. This raises an issue of fact.

Second, that the contracts and obligations of the Tinoco government, set up by Great Britain on behalf of its subjects, are void, and do not create a legal obligation, because the government of Tinoco and its acts were in violation of the constitution of Costa Rica of 1871.

Third, that Great Britain is stopped by the fact that it did not recognize the Tinoco government during its incumbency, to claim on behalf of its subjects that Tinoco's was a government which could confer rights binding on its successor.

Fourth, that the subjects of Great Britain, whose claims are here in controversy, were either by contract or the law of Costa Rica bound to pursue their remedies before the courts of Costa Rica and not to seek diplomatic interference on the part of their home government.

Dr. John Bassett Moore, now a member of the Permanent Court of Inter-

national Justice, in his *Digest of International Law*, Volume I, p. 249, announces the general principle which has had such universal acquiescence as to become well settled international law:

> Changes in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired. . . .
>
> The principle of the continuity of states has important results. The state is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper. The governments of Louis XVIII and Louis Philippe so far as practicable indemnified the citizens of foreign states for losses caused by the government of Napoleon; and the King of the Two Cicilies made compensation to citizens of the United States for the wrongful acts of Murat.

Again Dr. Moore says:

> The origin and organization of government are questions generally of internal discussion and decision. Foreign powers deal with the existing *de facto* government, when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself, and discharge its internal duties and its external obligations.

The same principle is announced in Professor Borchard's new work on *The Diplomatic Protection of Citizens Abroad:*

> Considering the characteristics and attributes of the *de facto* government, a general government *de facto* having completely taken the place of the regularly constituted authorities in the state binds the nation. So far as its international obligations are concerned, it represents the state. It succeeds to the debts of the regular government it has displaced and transmits its own obligations to succeeding titular governments. Its loans and contracts bind the state and the state is responsible for the governmental acts of the *de facto* authorities. In general its treaties are valid obligations of the state. It may alienate the national territory and the judgments of its courts are admitted to be effective after its authority has ceased. An exception to these rules has occasionally been noted in the practice of some of the states of Latin America, which declare null and void the acts of a usurping *de facto* intermediary government, when the regular government it has displaced succeeds in restoring its control. Nevertheless, acts validly undertaken in the name of the state and having an international character cannot lightly be repudiated and foreign governments generally insist on their binding force. The legality or constitutional legitimacy of a *de facto* government is without importance internationally so far as the matter of representing the state is concerned. (Bluntschli, Sects. 44, 45, 120; Holtzendorff, II, Sect. 21; Pradier Fodere, Sect. 134, 139; Rivier, II, 131, 440; Rougier, 481; *France* v. *Chile*, Franco Chilean Arbitration, Lausanne, p. 220.)

The same views are expressed by Chancellor Kent (1 Comm. 14th ed., p. 25), by Mr. Wheaton (Wheaton's *International Law*, Philippson's 5th Eng. ed., p. 37), and by Mr. Hall (*International Law*, 6th ed., J. B. Attay, 1909, pp. 20, 21), and by Dr. Woolsey in his *Introduction to the Study of International Law* (ed. 1873, pp. 32, 52, 53, 171, 172).

First, what are the facts to be gathered from the documents and evidence submitted by the two parties as to the *de facto* character of the Tinoco government?

In January, 1917, Frederico A. Tinoco was Secretary of War under Alfredo Gonzalez, the then President of Costa Rica. On the ground that Gonzalez was seeking reelection as President in violation of a constitutional limitation, Tinoco used the army and navy to seize the government, assume the provisional headship of the Republic and become Commander-in-Chief of the army. Gonzalez took refuge in the American Legation, thence escaping to the United States. Tinoco constituted a provisional government at once and summoned the people to an election for deputies to a constituent assembly on the first of May, 1917. At the same time he directed an election to take place for the Presidency and himself became a candidate. An election was held. Some 61,000 votes were cast for Tinoco and 259 for another candidate. Tinoco then was inaugurated as the President to administer his powers under the former constitution until the creation of a new one. A new constitution was adopted June 8, 1917, supplanting the constitution of 1871. For a full two years Tinoco and the legislative assembly under him peaceably administered the affairs of the Government of Costa Rica, and there was no disorder of a revolutionary character during that interval. No other government of any kind asserted power in the country. The courts sat, Congress legislated, and the government was duly administered. Its power was fully established and peaceably exercised. The people seemed to have accepted Tinoco's government with great good will when it came in, and to have welcomed the change. Even the committee of the existing government, which formulated and published a report on May 29, 1920, directing the indictment of President Tinoco for the crime of military revolution and declaring the acts of his régime as null and void and without legal value, used this language:

> Without having a constitution to establish the office of President and determine his functions, and even to indicate the period for which he was to be elected, the election was held by the sole will of the person who was violently exercising the executive power. And as was natural, the election fell to the same Mr. Tinoco, and, sad to relate, the country applauded! The act, therefore, of decreeing that said election should be held under such conditions is contrary to the most rudimentary principles of political law.

The quotation is only important to show the fact of the then acquiescence of the people in the result. Though Tinoco came in with popular approval,

the result of his two years administration of the law was to rouse opposition to him. Conspiracies outside of the country were projected to organize a force to attack him. But this did not result in any substantial conflict or even a nominal provisional government on the soil until considerably more than two years after the inauguration of his government, and did not result in the establishment of any other real government until September of that year, he having renounced his Presidency in August preceding, on the score of his ill health, and withdrawn to Europe. The truth is that throughout the record as made by the case and counter case, there is no substantial evidence that Tinoco was not in actual and peaceable administration without resistance or conflict or contest by anyone until a few months before the time when he retired and resigned.

Speaking of the resumption of the present government, this passage occurs in the argument on behalf of Costa Rica:

> Powerful forces in Costa Rica were opposed to Tinoco from the outset, but his overthrow by ballot or unarmed opposition was impossible and it was equally impossible to organize armed opposition against him in Costa Rican territory.

It is true that action of the supporters of those seeking to restore the former government was somewhat delayed by the influence of the United States with Gonzalez and his friends against armed action, on the ground that military disturbances in Central America during the World War would be prejudicial to the interests of the Allied Powers. It is not important, however, what were the causes that enabled Tinoco to carry on his government effectively and peaceably. The question is, must his government be considered a link in the continuity of the Government of Costa Rica? I must hold that from the evidence that the Tinoco government was an actual sovereign government.

But it is urged that many leading Powers refused to recognize the Tinoco government, and that recognition by other nations is the chief and best evidence of the birth, existence and continuity of succession of a government. Undoubtedly recognition by other Powers is an important evidential factor in establishing proof of the existence of a government in the society of nations. What are the facts as to this? The Tinoco government was recognized by Bolivia on May 17, 1917; by Argentina on May 22, 1917; by Chile on May 22, 1917; by Haiti on May 22, 1917; by Guatemala on May 28, 1917; by Switzerland on June 1, 1917; by Germany on June 10, 1917; by Denmark on June 18, 1917; by Spain on June 18, 1917; by Mexico on July 1, 1917; by Holland on July 11, 1917; by the Vatican on June 9, 1917; by Colombia on August 9, 1917; by Austria on August 10, 1917; by Portugal on August 14, 1917; by El Salvador on September 12, 1917; by Roumania on November 15, 1917; by Brazil on November 28, 1917; by Peru on December 15, 1917; and by Ecuador on April 23, 1917.

What were the circumstances as to the other nations?

The United States, on February 9, 1917, two weeks after Tinoco had assumed power, took this action:

> The Government of the United States has viewed the recent overthrow of the established government in Costa Rica with the gravest concern and considers that illegal acts of this character tend to disturb the peace of Central America and to disrupt the unity of the American continent. In view of its policy in regard to the assumption of power through illegal methods, clearly enunciated by it on several occasions during the past four years, the Government of the United States desires to set forth in an emphatic and distinct manner its present position in regard to the actual situation in Costa Rica which is that it will not give recognition or support to any government which may be established unless it is clearly proven that it is elected by legal and constitutional means.

And again on February 24, 1917:

> In order that citizens of the United States may have definite information as to the position of this Government in regard to any financial aid which they may give to, or any business transaction which they may have with those persons who overthrew the constitutional Government of Costa Rica by an act of armed rebellion, the Government of the United States desires to advise them that it will not consider any claims which may in the future arise from such dealings, worthy of its diplomatic support.

The Department of State issued the following in April, 1918:

> The Department of State has received reports to the effect that those citizens of Costa Rica now exercising the functions of government in the Republic of Costa Rica have been led to believe by those persons who are acting as their agents, that the Government of the United States was considering granting recognition to them as constituting the Government of Costa Rica.
>
> In order to correct any such impression which is absolutely erroneous, the Government of the United States desires to state clearly and emphatically that it has not altered the attitude which it has assumed in regard to the granting of recognition to the above mentioned citizens of Costa Rica and which was conveyed to them in February, 1917, and further that this attitude will not be altered in the future.

Probably because of the leadership of the United States in respect to a matter of this kind, her then Allies in the war, Great Britain, France and Italy, declined to recognize the Tinoco government. Costa Rica was, therefore, not permitted to sign the Treaty of Peace at Versailles, although the Tinoco government had declared war against Germany.

The merits of the policy of the United States in this non-recognition it is not for the arbitrator to discuss, for the reason that in his consideration of this case, he is necessarily controlled by principles of international law, and however justified as a national policy non-recognition on such a ground may be, it certainly has not been acquiesced in by all the nations of the world, which is a condition precedent to considering it as a postulate of international law.

The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law.

Second. It is ably and earnestly argued on behalf of Costa Rica that the Tinoco government cannot be considered a *de facto* government, because it was not established and maintained in accord with the constitution of Costa Rica of 1871. To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true. The change by revolution upsets the rule of the authorities in power under the then existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary. To speak of a revolution creating a *de facto* government, which conforms to the limitations of the old constitution is to use a contradiction in terms. The same government continues internationally, but not the internal law of its being. The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government usually does, respected within its own jurisdiction?

Reference is further made, on behalf of Costa Rica, to the Treaty of Washington, December 20, 1907, entered into by the Republics of Central America, in which it was agreed that

> The governments of the contracting parties will not recognize any one who rises to power in any of the five republics in consequence of a coup d'état or by a revolution against a recognized government until the representatives of the people by free elections have reorganized the country in constitutional form.

Such a treaty could not affect the rights of subjects of a government not a signatory thereto, or amend or change the rules of international law in the matter of *de facto* governments. Their action under the treaty could not be of more weight in determining the existence of a *de facto* government under Tinoco than the policy of the United States, already considered. Moreover, it should be noted that all the signatories to the treaty but Nicaragua manifested their conviction that the treaty requirement had been met in the case of the Tinoco government, by recognizing it after the adoption of the constitution of 1917 and the election of Tinoco.

Third. It is further objected by Costa Rica that Great Britain by her failure to recognize the Tinoco government is estopped now to urge claims of her subjects dependent upon the acts and contracts of the Tinoco government. The evidential weight of such non-recognition against the claim of its *de facto* character I have already considered and admitted. The contention here goes further and precludes a government which did not recognize a *de facto* government from appearing in an international tribunal in behalf of its nationals to claim any rights based on the acts of such government.

To sustain this view a great number of decisions in English and American courts are cited to the point that a municipal court cannot, in litigation before it, recognize or assume the *de facto* character of a foreign government which the executive department of foreign affairs of the government of which the court is a branch has not recognized. This is clearly true. It is for the executive to decide questions of foreign policy and not courts. It would be most unseemly to have a conflict of opinion in respect to foreign relations of a nation between its department charged with the conduct of its foreign affairs and its judicial branch. But such cases have no bearing on the point before us. Here the executive of Great Britain takes the position that the Tinoco government which it did not recognize, was nevertheless a *de facto* government that could create rights in British subjects which it now seeks to protect. Of course, as already emphasized, its failure to recognize the *de facto* government can be used against it as evidence to disprove the character it now attributes to that government, but this does not bar it from changing its position. Should a case arise in one of its own courts after it has changed its position, doubtless that court would feel it incumbent upon it to note the change in its further rulings.

Precedents in American arbitrations are cited to show that an estoppel like the one urged does arise. They are Schultz's case (Moore, *International Arbitrations*, Vol. 3, 2973), Janson's case (*ibidem*, 2902), and Jarvis's case (Ralston, *Venezuela Arbitrations*, 150). In the opinions of these cases delivered by American commissioners, there are expressions sustaining the view that the bar of an estoppel exists, but an examination shows that no authorities are cited and no arguments are made in support of the view. Moreover, the array of facts in the cases was conclusive against the existence of a *de facto* government, and the expressions were unnecessary to the conclu-

sion. In Schultz's case the claim of an American citizen was against the Juarez government for loss of goods by fire between the lines of battle waged by Miramon's forces against Juarez's government. The claim against Juarez's government was plainly not sustainable, first because it occurred in the train of war and, second, because the Miramon forces never had in fact constituted a *de facto* government. The Janson case before the same tribunal was for the value of an American bark seized by Miramon's soldiers to escape out of the country from the victorious army of Juarez. The commissioner devotes many pages to a résumé of evidence to show that neither Miramon nor Maximilian, with whom he acted, had ever had a *de facto* government; that Juarez was always in control of the greater part of Mexico and always resisting. The truth is that the language of the decisions should be more properly construed to emphasize the great and overwhelming weight to be given to the recognition of Juarez by the United States and its non-recognition of Miramon as evidence against the *de facto* character of the government of the latter, than to uphold the theory of a bar by estoppel.

In Jarvis's case the facts were that Paez, a Venezuelan citizen, was an insurgent against the existing government of Venezuela in 1849, and enlisted in his conspiracy Jarvis, the American claimant, who furnished him a ship and arms and ammunition. This was a crime against the United States on Jarvis's part, because the United States was on terms of amity with Venezuela. The expedition failed. In 1861, thirteen years later, however, when Paez was in Venezuela, a sudden outbreak placed him in power. In 1863, just as he was about to retire with the collapse of his government, he issued bonds to Jarvis to repay him for his outlay in the unsuccessful insurrection of 1849, twelve years before. The commissioner held that there was no lawful consideration for the bonds. Certainly this was a righteous conclusion. It was a personal obligation of Paez, if it was an obligation at all. It was not a debt of Venezuela. It was invalid and unlawful because of its vicious origin, both by the laws of the United States and the laws of Venezuela. The commissioner also by way of additional but unnecessary support to his conclusion said the United States was estopped to urge the claim.

These are, so far as I am advised, the only authorities to be found either in decided cases or in text writers applying the principles of estoppel to bar a nation seeking to protect its nationals in their rights against the successor of a *de facto* government.

I do not understand the arguments on which an equitable estoppel in such case can rest. The failure to recognize the *de facto* government did not lead the succeeding government to change its position in any way upon the faith of it. Non-recognition may have aided the succeeding government to come into power; but subsequent presentation of claims based on the *de facto* existence of the previous government and its dealings does not work an injury to the succeeding government in the nature of a fraud or breach of

faith. An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him. There is no such case here.

There are other estoppels recognized in municipal law than those which rest on equitable considerations. They are based on public policy. It may be urged that it would be in the interest of the stability of governments and the orderly adjustment of international relations, and so a proper rule of international law, that a government in recognizing or refusing to recognize a government claiming admission to the society of nations should thereafter be held to an attitude consistent with its deliberate conclusion on this issue. Arguments for and against such a rule occur to me; but it suffices to say that I have not been cited to text writers of authority or to decisions of significance indicating a general acquiescence of nations in such a rule. Without this, it cannot be applied here as a principle of international law.

It is urged that the subjects of Great Britain knew of the policy of their home government in refusing to recognize the Tinoco régime and cannot now rely on protection by Great Britain. This is a question solely between the home government and its subjects. That government may take the course which the United States has done and refuse to use any diplomatic offices to promote such claims and thus to leave its nationals to depend upon the sense of justice of the existing Costa Rican Government, as they were warned in advance would be its policy, or it may change its conclusion as to the *de facto* existence of the Tinoco government and offer its subjects the protection of its diplomatic intervention. It is entirely a question between the claimants and their own government. It should be noted that Great Britain issued no such warning to its subjects as did the United States to its citizens in this matter.

The fourth point made on behalf of Costa Rica against the claims here pressed is that both claimants are bound either by their own contractual obligation entered into with the Government of Costa Rica, or by the laws of Costa Rica, to which they subscribed, not to present their claims by way of diplomatic intervention of their home government, but to submit their claims to the courts of Costa Rica. This is in effect a plea in abatement to the jurisdiction of the arbitrator, which, under the terms of the arbitration, Costa Rica has the right to advance.

So far as the Amory concession, and the claim of the Petroleum Company is concerned, the plea turns on two provisions of the concession. One is on Article XIX, as follows:

> The present contract shall elapse, and the government may so declare by an Executive Order, in the following cases only:
> 6. If the contractor has recourse to diplomatic action in connection with any dispute or litigation as to the rights and privileges granted by this contract, but the forfeiture of this concession shall not be pro-

nounced by the government without having given to the concessionaire the opportunity to defend himself nor without having submitted the point to arbitration.

Article XXI:

Any dispute arising between the parties in respect to the interpretation or execution of this contract which cannot be compromised, shall be submitted to arbitration and decided according to the laws of Costa Rica. If the parties fail to agree on one arbitrator, each shall appoint one, and the two arbitrators in case of disagreement shall choose a third as umpire.

These two limitations do not seem to include within their scope such a question as the power of the Tinoco government to grant the concession, or the obligation of the present government of Costa Rica to recognize it. They cover the interpretation and construction of the contract rather than the fundamental question of its existence.

With respect to the Royal Bank, the facts are somewhat different. The bank obtained the right to establish a branch or agency in Costa Rica under the following order:

DEPARTMENT OF TREASURY AND COMMERCE
No. 437

SAN JOSE, *August 7, 1915.*

Whereas it is recorded in the documents previously inserted that the Royal Bank of Canada, a society domiciled in Montreal, Province of Quebec, in the Dominion of Canada, is organized in accordance with the laws of that country; that said society has resolved to establish a branch or agency in Costa Rica, and that it has appointed in that country a representative clothed with sufficient power to manage the affairs of the branch or agency.

The President of the Republic

Resolves:

That it is in order to enter in the Mercantile Register the constitutive deed of the Royal Bank of Canada, as well as the additional one relating to the branch in this country, under the understanding that, in accordance with the provisions contained in Articles 11 and 12 of the Banking Law, the branch or agency shall not invoke its status as a foreign corporation, with respect to matters or operations of the bank, which in all cases shall be decided by the law courts of Costa Rica, and in entire subjection to the laws of that Republic.

Let it be published.

GONZALEZ.

Assistant Secretary of State in Charge of the Treasury and Commerce.
JORGE GUARDIA.

Articles 11 and 12 referred to in this banking law are as follows:

Article 11. Companies organized abroad for the establishment of banks of any kind within the republic shall subject themselves for effective organization to the provisions of this law and the banks, as well as their shareholders, shall be impressed with the character of Costa Rica citizenship to the extent of being denied the power to invoke the laws of any foreign country in matters relating to the affairs or opera-

tions of such banks; such matters must be decided by the tribunals of Costa Rica and in entire conformity with the laws of the republic.

Article 12. Banks established in the country as branches of foreign banks shall be equally subject to the provisions of the preceding article.

It is doubtful whether these restrictions upon the bank by their terms go so far as to forbid its appeal for diplomatic intervention in protection of its rights. They show clearly that the powers conferred by the government of its origin cannot enlarge its banking powers in Costa Rica and that its rights are to be decided by Costa Rican courts and according to Costa Rican law. But to carry this to a denial of the right to a diplomatic intervention by its own government to avoid legislative nullification of its rights without a hearing would be going far.

It has been held in a number of important arbitrations, and by several foreign secretaries, that such restrictions are not binding upon a home government and will not prevent it from exercising its diplomatic functions to protect its nationals against the annulment of the rights secured to them by the laws of the country in force when the obligations arose. Wharton's *Digest*, II, p. 612, Sect. 230; Moore's *Digest*, III, 307; Ralston's *Report*, I, p. 819; *Am. Foreign Relations*, 1887, p. 99; *American Foreign Relations*, 1902, pp. 870, 871; Moore, *Intern. Arbitrations*, 1644; Ralston, *Intern. Arbitral Law*, p. 48; Borchard, *Diplomatic Protection of Citizens Abroad*, 293.

However this may be, these restrictions upon each claimant would seem to be inapplicable to a case like the present where is involved the obligation of a restored government for the acts or contracts of a usurping government. The courts of the restored government are bound to administer the law of the restored government under its constitution and their decisions are necessarily affected by the limitations of that instrument. This may prevent the courts from giving full effect to international law that may be at variance with the municipal law which under the restored constitution the national courts have to administer. It is obvious that the obligations of a restored government for the acts of the usurping *de facto* government it succeeds cannot, from the international standpoint, be prejudiced by a constitution which, though restored to life, is for purposes of this discussion, exactly as if it were new legislation which was not in force when the obligations arose.

Nor is it an answer to this, to suggest that in the case here under consideration, the restored constitution may be construed not to prevent the Costa Rican courts from giving effect to the principles of international law, already stated. It is enough that the restored constitution is the controlling factor in the exercise of any jurisdiction to be exercised by those courts, and that other nations may object to a tribunal which must give consideration to legislation enacted after the fact, in reaching its decision.

This is not an exceptional instance of an essential difference between the scope and effect of a decision by the highest tribunal of a country and of an international tribunal. The Constitution of the United States makes the

Constitution, laws passed in pursuance thereof, and treaties of the United States the supreme law of the land. Under that provision, a treaty may repeal a statute, and a statute may repeal a treaty. The Supreme Court cannot under the Constitution recognize and enforce rights accruing to aliens under a treaty which Congress has repealed by statute. In an international tribunal, however, the unilateral repeal of a treaty by a statute would not affect the rights arising under it and its judgment would necessarily give effect to the treaty and hold the statute repealing it of no effect.

Another and conclusive answer to this plea in abatement to the jurisdiction here is found in the fact that the provisional government of Barquero, succeeding that of Tinoco, which subsequently and peaceably and in due course merged into the existing government, took away the power of the then courts of Costa Rica to hear the suit of the Royal Bank already instituted, or to entertain any suit involving rights against the government, decreed a moratorium for a year of the claims of this character, and forbade the issue of any mesne or final execution upon the property of the Banco Internacional or of the state in satisfaction of such claims. It is true that all these acts of the provisional government were repudiated by a legislative decree of the present government in August of 1920, some ten months after its accession. This was at a time when the Law of Nullities had already passed Congress and was only delayed by the veto of the President. In a few days it was made into law by its passage over his veto. The Law of Nullities was a legislative decree without any hearing declaring invalid the rights which the bank claimed to have against the Banco Internacional and against the government. It was merely a continuation of the legislative policy begun in different form by the provisional government for defeating these claims.

It is true that the bank might then have continued its litigation and have contested the validity of the Law of Nullities before the courts of Costa Rica, but it would have had to do so before a court that was elected by the same Congress which passed the Law of Nullities, the previous court having been reorganized by the Congress. Without in any way implying a criticism of the new court, or a doubt as to its spirit of judicial inquiry, I think the previous course of the provisional government, the enactment of the Law of Nullities, and the constitutional limitation upon the scope of the decision of Costa Rican courts, already referred to, so changed the situation with respect to the rights of the bank when it began its suit that the restored government must be held to have waived the enforcement of any limitation upon the right of the bank to invoke the protection of its home government under the circumstances.

The same views must apply in favor of the concessionaire under the Amory concession if the restrictions of its concession are to be construed as limiting the power of the concessionaire to invoke diplomatic intervention without a resort to the courts.

A consideration of the issues before us, therefore, recurs to the merits of the two claims. The decision of them must be governed by the answer to the question whether the claims would have been good against the Tinoco government as a government, unaffected by the Law of Nullities, and unaffected by the Costa Rican Constitution of 1871.

It is suggested on behalf of Great Britain that the scope of the arbitration does not involve an examination by the arbitrator into the merits of the claims after the general principles applying to the Law of Nullities and its validity shall have been decided. I cannot yield to this suggestion. The recitals of the treaty show that the demand and claims of Great Britain and of Costa Rica in this arbitration are to be determined from the "notes which His Britannic Majesty's Minister addressed to the Costa Rican Ministry for Foreign Affairs on July 13 and November 8, 1921, and in antecedent correspondence, and on the part of the Costa Rican Government, in their notes in reply relative to the present diplomatic controversy, and especially in the Congressional resolution of the 13th of December of that same year". An examination of these references leaves no doubt that not only was the validity of the Law of Nullities in defeating the claim of the bank and the Amory concession involved, but also the merits of the claim of the bank and of the concession, assuming the Law of Nullities to be itself a nullity.

Coming now to the merits of the Royal Bank claim, the facts, so far as I can gather them from the exhibits and evidence produced by both parties, are:

The Banco Internacional de Costa Rica was established as a bank to be conducted by private persons under the immediate supervision of the executive power, and on October 14, 1914, was given authority to issue notes to the amount of four million colones, in accordance with the banking law of Costa Rica and the amendments thereto. The issue was to be secured by Treasury bonds. This law continued in force under the Tinoco régime. On June 29, 1919, the Chamber of Deputies by law provided that the Banco Internacional should be authorized to make a new issue of notes of 15,000,000 colones. The notes were to be given the same legal tender quality as attached to the bills then in circulation under the law of 1914. Of the sum thus to be issued, ten million colones were to be applied to the interests of the government for its public administration. The remaining amount was to be distributed, 2,500,000 colones to increase the emergency fund and the borrowing capacity of the Banco Internacional de Costa Rica for private loans, 1,500,000 colones to be devoted to rural loans to future farmers, veterans of the army, and 1,000,000 colones to be invested in construction and repair of national roads. All revenues from postal, telegraph and stamped paper sources were pledged to the state to secure this issue. After June, 1920, the principal administration of state revenues was to pay to the bank the total amount derived from the revenues, and the bank was then to devote this amount, taking up and withdrawing from circulation all bills

authorized by the present law and to destroy them. Article VI provided that the government should, after the proclamation of the law, make a deposit in American gold or drafts of the United States in the Banco Internacional, to be operated in the form of a revolving credit, to be used exclusively by the bank to sell bills of exchange to merchants and private persons at a fixed maximum rate of exchange. The executive power was authorized to make rules and regulations necessary for the proper enforcement of the law. On July 10, 1919, the law just described was amended by providing that the bills to be issued should bear a clear statement of their value by means of letters and numbers, together with a statement of the obligation of the bank to pay them at sight to bearer in national gold money, and they were to be issued in the denominations which included a denomination of 1,000 colones. By an order of the President, and because of the absence of the usual forms of colones bills, it was directed on July 10, 1919, that there might be a provisional issue to the value of 2,500,000 colones of "*Bonos sobre especies fiscales*" of the value of 1,000 colones each. These had been bonds prepared for issue but which had not been placed in circulation, and it was directed that they should be known and treated as bills of the Banco Internacional de Costa Rica, and should bear on their left margin the impression of the seal of the Ministry of the Treasury.

On the 16th of July, there was deposited in the Royal Bank of Canada, to the credit of the Costa Rican Government, a check drawn by Jimenez, Minister of the Treasury, against the Banco Internacional de Costa Rica for 1,000,000 colones. On the stub of the check was a memorandum that it was payable in provisional bills of 1,000 colones. The face of the check contained the words "Supreme Government Law No. 12 of June 28, 1919". The check was presented to the Banco Internacional, which accordingly delivered in payment thereof, to the Royal Bank, one thousand 1,000 colones bills of the form above given.

Thereafter the Minister of Finance, after a conversation with the manager of the Royal Bank, in which he explained that the circulation of such irregularly prepared bills might produce confusion, wrote under date of July 17, 1919, as follows:

> Dear Sir:
>
> With reference to the deposit made yesterday at your bank for one million (1,000,000) colones in notes of one thousand (1,000) colones each, which you agreed to withhold from circulation, I hereby confirm our verbal agreement, as follows:
>
> That this Ministry will pay interest at the rate of 10 per cent. per annum on the amount of the deposit that is utilized and that before September 15 next, the notes of this deposit will be replaced by current issues.
>
> Yours truly,
>
> FRANKLIN JIMENEZ,
> *Minister of Finance.*

It is alleged on behalf of Great Britain that the Government of Costa Rica then drew against this account for governmental purposes, and that the bank honored the checks, some twenty in number, which exhausted the deposit. Subsequently the Royal Bank succeeded in circulating two of the 1,000 colones notes, receiving their face value, and reducing the amount of notes held by it to 998,000 colones.

Upon these facts rests the claim that the Costa Rican Government and the Banco Internacional must recognize the validity of the thousand colones bank notes still held by the Royal Bank, and make them good, or pay to it the money which it expended in honoring the checks drawn against the million colones deposit for governmental purposes.

The account, showing the ultimate application of the deposit, as presented by Great Britain, from the books of the Royal Bank, is as follows:

1919		Debit	Credit
July 16.	To International Bank	C 1,000,000.00	
July 17.	For the Royal Bank of Canada Revolving Credit		C 900,000.00
17.	To Royal Bank of Canada Revolving Credit	450,000.00	
17.	For Public Debt Service		5,000.00
26.	For Foreign Relations Dept.		45,000.00
Aug. 2.	For War and Police M. Dept.		1,500.00
2.	For Royal Bank of Canada Revolving Credit		225,000.00
4.	For Bank of Costa Rica Cur. Act.		135,000.00
4.	For Bank of Costa Rica Cur. Act.		202.95
4.	To purchase of drafts	51,750.00	
4.	For War and Police M. Dept.		40,000.00
5.	For Bank of Costa Rica Cur. Act.		116,355.17
6.	For Bank of Costa Rica Cur. Act.		7,177.50
7.	To French Loan Service	26,000.00	
8.	For Bank of Costa Rica Cur. Act.		56,000.00
8.	To Purchase of Drafts	35,200.00	
9.	For Bank of Costa Rica Cur. Act.		18,898.70
13.	For Bank of Costa Rica Cur. Act.		1,500.00
Dec. 27.	Balance		155.68
		C 1,562,950.00	C 1,562,950.00

In its effort to secure evidence explaining or impeaching this account, Costa Rica filed a demand before a local court in Costa Rica for the production of evidence, including the following:

> 1. The accounts in American gold and in colones which do now exist or which may have existed in the past in the name of the government of this republic or of the Minister or of the Secretary of the Treasury, and that the entries made both in the ledger and the journal be duly certified. 2. All the accounts which may have any connection with those indicated in the immediately preceding number, and that such entries made both in the ledger and the journal as may be connected with those which are mentioned in No. 1 above, be duly certified.

The agent of the Royal Bank denied the jurisdiction of the court to require their production, but used the following language:

> Whether obliged or not to do it the Royal Bank of Canada is ready and willing to produce, as soon as it is ordered to do so, all its accounts and any other documents within its powers which the high arbitrator may need, and it is to be observed that the bank has already sent to its New York office, for the purpose of being presented, in case of need, a part of the documents which have been asked for.

The Costa Rican Government in its counter case says that it "is unwilling to agree to the *ex parte* production of these accounts before the arbitrator, after it is too late for a full discussion of them by the Government of Costa Rica, and also without an opportunity of ascertaining that what is produced is really a full and reliable disclosure of all the transactions, especially in view of their admission, above quoted, that the documents in New York are only 'a part of the documents which have been asked for' ".

In its counter case the Government of Costa Rica does present additional accounts between the Royal Bank of Canada and the government, taken from the books of the government entered during the Tinoco régime. This certified account includes not only the account of the Royal Bank of Canada with the government, already introduced, on behalf of the Royal Bank, which is said to appear on the ledger—folio 669 and 691, but also an account on folio 678 and 690, which is as follows:

THE ROYAL BANK OF CANADA REVOLVING CREDIT CURRENT ACCOUNT GOLD

1919		Debit	Credit
July 5.	To Sundries	$64,447.95	
7.	For War and Police M. Dept.		$60,000.00
17.	To Sundries	200,000.00	
17.	For Sundries		100,000.00
Aug. 2.	To Sundries	50,000.00	
2.	To International Bank	50,000.00	
2.	For Foreign Relations Dept.		200,000.00
9.	For Regular Export Duties Sundries		200.00
11.	For Treasury Dept.		4,247.95
		$364,447.95	$364,447.95

Then follow journal entries relating to the two foregoing accounts:

Journal entry of July 16th, in explanation of the million dollar colones deposit was as follows:

Entry No. 1538 F		July 16, 1919.
	Debit	Credit
The Royal Bank of Canada Special Account	C 1,000,000.00	
To International Bank		C 1,000,000.00
Account of check No. A 109755 drawn on the same to the order of the Royal Bank of Canada payable in provisional bills of C 1,000, which shall be exchanged for		

current bills before the 15th of September next as per agreement with the Minister of the Treasury. Interest at 10 per cent. per annum shall be paid to it on the sums which the Minister of the Treasury shall use from the said deposit.

Following that is a journal entry No. 1546 F, as follows:

July 17, 1919.

	Debit	Credit
The Royal Bank of Canada Revolving Credit Account	C 1,000,000.00	
Equivalent in colones at 500 per cent. exchange of $200,000.00 deposited today in said Bank for the purposes of Article G of Law No. 12 of the 28th of June ultimo.		
To The Royal Bank of Canada		C 900,000.00
Amount of the following checks drawn yesterday from said Bank and from John M. Keith's the $200,000.00 deposited to the order of the Ministry of the Treasury, upon the reimbursement of the equivalent in colones at 450 per cent. exchange, as per contract with Enrique R. Clare of the 26th of June ultimo.		
No. 79501 to the order of the Royal Bank of Canada	C 742,500.00	
No. 79502 to the order of John M. Keith	157,500.00	
To Pending Accounts		100,000.00
Enrique Clare		
Sum paid to Clare on the 26th of June ultimo, as per the contract above referred to, by check No. A, 109,248 on the International Bank.		

Another journal entry No. 1717 F is as follows:

Entry No. 1717 F

August 2, 1919.

	Debit	Credit
Foreign Relations Dept.	C 846,000.00	
Emergency		
Equivalent in colones at 423 per cent. exchange of $100,000.00 to the order of the Minister of Foreign Relations and $100,000.00 to the order of Jose Joaquin Tinoco, the former for expenses of representation of the Chief of the State in his approaching trip abroad, and the latter, value of four annuities of salaries and office expenses of the Legation of Costa Rica in Italy which has been put in charge of Mr. Tinoco.		
To the Royal Bank of Canada Current Account in Gold		C 430,000.00
Equivalent at 215 per cent. exchange of $200,000; amount of the following checks drawn upon the same:		
No. 304 to the order of Jose Joaquin Tinoco $100,000.00		
No. 305 to the order of the Minister of Foreign Relations 100,000.00		
To Difference in Exchange		416,000.00
Difference between 423 per cent. and 215 per cent. exchange.		

In addition to this, there is in evidence a letter written by the Manager of the Royal Bank of Canada, under date of July 27, 1921, which further explains the payment of the checks Nos. 304 and 305. It is as follows:

Sir: Referring to your communication dated the 25th instant, I have the pleasure to inform you that cheques numbers 304 and 305 drawn by the Ministry of the Treasury on the 2nd of August, 1919, for $100,000 each, and against the account of the Government in this Bank, were paid with bills of exchange on the solicitation and to the satisfaction of the bearer of each one of said cheques as follows:

Cheque No. 304 drawn by the Minister of the Treasury (Franklin Jimenez), in favor of Jose Joaquin Tinoco, and dated August 2, 1919, endorsed by Jose Joaquin Tinoco. The cheque was exchanged for $100,000 in Bill of Exchange on New York; this transaction was effected by Jaime Esquivel as follows:

No.	Date	Against	In favor of	Amount	Paid
5783	Aug. 2, 1919	Royal Bank of Canada, New York	Jaime Esquivel	$10,000	Sept. 27, 1919
5784	"	"	"	10,000	"
5785	"	"	"	10,000	"
5786	"	"	"	10,000	"
5787	"	"	"	10,000	"
5788	"	"	"	10,000	"
5789	"	"	"	10,000	"
5790	"	"	"	10,000	"
5791	"	"	"	10,000	"
5792	"	"	"	10,000	"

Cheque No. 305 drawn by the Minister of the Treasury (Franklin Jimenez), in favor of the Minister of Foreign Relations, dated August 2, 1919, endorsed by the Minister of Foreign Relations (Guillermo Vargas). This cheque was exchanged for $100,000 in Bills of Exchange on New York and which transaction was effected by Jaime Esquivel as follows:

No.	Date	Against	In favor of	Amount	Paid
5788	Aug. 2, 1919	Royal Bank of Canada New York	Frederico Tinoco	$20,000	Aug. 26, 1919
5781	"	"	"	20,000	Aug. 22, 1919
5782	"	"	"	20,000	Aug. 26, 1919
325131	4	Chase National Bank of New York	"	5,000	Sept. 26, 1919
325132	"	"	"	5,000	Sept. 26, 1919
325133	"	"	"	5,000	Aug. 26, 1919
325134	"	"	"	5,000	Aug. 26, 1919
325135	"	"	"	5,000	Sept. 26, 1919
325136	"	"	"	5,000	Sept. 26, 1919
325137	"	"	"	5,000	Aug. 26, 1919
325138	"	"	"	5,000	Aug. 26, 1919

I am, dear Sir, Very faithfully yours,

The Royal Bank of Canada,
T. J. REARDON, *Manager*.

These accounts taken from the Treasury Department were furnished by Costa Rica to the other side before this arbitration began, so that the Royal Bank has been long advised of their existence and contents. The failure of

the bank to produce any further statements of accounts from its own books in explanation of the accounts thus appearing on the government books not only makes these government accounts competent evidence, but also justifies inferences therefrom in the absence of explanation which the coincidence of dates and the circumstances shown by other evidence make inevitable.

It is evident from the exhibits that in the spring of 1919 the popularity of the Tinoco régime had disappeared, and that the political and military movement to end that régime was gaining strength. Supporters of the former government invaded the northern part of Costa Rica and the Tinoco government found it necessary to suspend the guarantees of personal liberty and establish martial law, beginning early in 1919, for periods of thirty days continuously renewed until its fall in September. The sinking credit of the Tinoco government and the expenses of the maintenance of the army raised in its defense, had produced a stress in its finances which led to the legislation authorizing the issue of the fifteen millions of colones. The emergency was illustrated in the use of the very irregular form of the notes of issue by the Banco Internacional de Costa Rica authorized by the legislation of June and July of 1919, and by a sale of the deposit of silver coin held in reserve by the Bank of Costa Rica, which acted as the national treasury. It became perfectly clear from the mob violence and disturbances in June, and the evidences of the unpopularity of the Tinoco régime, that it was in a critical condition, and an agent of the Royal Bank testifies that the retirement of the Tinocos "was known as a positive thing about to take place when the silver transaction was carried out on the 5th of July, when the account in American gold for the value of the coined silver was opened on the 5th of July, and when the million dollar colones deposit was made on the 16th of July". In the light of these circumstances, it is not difficult to infer from the figures set forth in the foregoing account that there is an identity between the million colones deposit of July 16th and the $200,000 credit of July 17th to the government in the so-called gold revolving credit account set forth above.

The language of the entry No. 1546 F, of date July 17, 1919, and its reference to Article 6 of Law No. 12, shows that this whole deposit was to be transferred to the Revolving Credit Account Gold of the Royal Bank in the amount of $200,000. It was accomplished by three checks, one to the order of the Royal Bank itself, one to the order of John M. Keith, and one to the order of Enrique Clare. The account presented by the British Government on behalf of the Royal Bank, lumps first two checks in an item of 900,000 colones, debiting the Royal Bank Revolving Credit Account, thus showing the destination of both. Without explanation, it may be difficult to fix the exact details of this transaction, but the amounts, the dates, and the result leave no doubt in my mind that the deposit of the 1,000,000 on July 16th, the check for 900,000 colones also deposited in the Bank, the credit to the government of $200,000 on the 17th in the Revolving Credit Current Ac-

count Gold, and the withdrawal of $200,000 on August 2nd, were all part of the same transaction intended to secure to the two Tinocos the drafts for $100,000 each, shown by journal entry 1717 F, and by the letter of January 27, 1921, from the Manager of the Royal Bank.

It thus appears that the present claim of the bank rests on its payment of $200,000 to the Tinocos, $100,000 to Frederico Tinoco, "for expenses of representation of the Chief of State in his approaching trip abroad", and $100,000 to Jose Joaquin Tinoco, as Minister of Costa Rica to Italy for four years' salary and expenses of the Legation of Costa Rica in Italy, to which post the latter had been appointed by his brother. The Royal Bank cannot here claim the benefit of the presumptions which might obtain in favor of a bank receiving a deposit in regular course of business and paying it out in the usual way upon checks bearing no indication on their face of their purpose. The whole transaction here was full of irregularities. There was no authority of law, in the first place for making the Royal Bank the depositary of a revolving credit fund. The law of June 28th authorized only the Banco Internacional to be made such a depositary. The thousand dollar colones bills were most informal and did not comply with the requirements of law as to their form, their signature or their registration. The case of the Royal Bank depends not on the mere form of the transaction but upon the good faith of the bank in the payment of money for the real use of the Costa Rican Government under the Tinoco régime. It must make out its case of actual furnishing of money to the government for its legitimate use. It has not done so. The bank knew that this money was to be used by the retiring president, F. Tinoco, for his personal support after he had taken refuge in a foreign country. It could not hold his own government for the money paid to him for this purpose.

The case of the money paid to the brother, the Secretary of War, and the appointed Minister to Italy, is much the same. The government book entry charges him with this as a payment for expenses to be incurred in the establishment of a legation in Italy. It includes the salaries and expenses for four years. To pay salaries for four years in advance is a most unusual and absurd course of business. All the circumstances should have advised the Royal Bank that this second draft, too, was for personal and not for legitimate government purposes. It must have known that Jose Joaquin Tinoco in the fall of his brother's government, which was pending, could not expect to represent the Costa Rican Government as its Minister to Italy for four years, that the reasons given for the payment of the money were a mere pretense and that it was only, as in the case of his brother Frederico, an abstraction of the money from the public treasury to support a refugee abroad.

The 100,000 colones remaining of the deposit of 1,000,000 colones of July 16th, paid in a check to Enrique R. Clare, as shown by journal entry No. 1546 F of July 17, 1919, is a credit to "Pending Accounts", and is accom-

panied by the memorandum "Sum paid to Clare on the 26th of June ultimo as per the contract above referred to, by check No. A 109,248 on the International Bank". From the memorandum against the credit of 900,000 colones in the same entry this contract seems to have been an arrangement for exchange and may have been the amount needed to transfer the whole 1,000,000 colones deposit into $200,000 gold. Whatever it was, it is so closely connected with this payment for obviously personal and unlawful uses of the Tinoco brothers that in the absence of any explanation on behalf of the Royal Bank, it cannot now be made the basis of a claim that it was for any legitimate governmental use of the Tinoco government.

The claim of the Royal Bank against the Costa Rican Government has, however, been given a better status than as decided above, to the extent of one-half of it, by the act of the existing Government of Costa Rica in December, 1922. Jose Joaquin Tinoco was killed in the streets of the capital during the disturbance on August 10, 1919, which occurred in protest against the continuance of the Tinoco government. The present Government of Costa Rica prosecuted a suit for $100,000 against Joaquin Tinoco's estate in a Costa Rican Court, based on the payment by the Royal Bank of this sum to him. The suit was compromised by a mortgage given by his widow upon two estates of his for a full $100,000, of date December 21, 1922, the same to be paid within five years. The Government of Costa Rica in repudiating any obligation to the Royal Bank for paying $100,000 to Jose Joaquin Tinoco, of course, deprived itself of any just claim to real ownership of the mortgage upon his estates for that amount. This should enure to the benefit of the Royal Bank. Proceeding in this matter *ex aequo et bono*, therefore, I must hold that the bank is subrogated to the title of Costa Rica in the mortgage and that as a condition of the award against the bank, as to the whole 998,000 colones claimed by it, Costa Rica should transfer and assign the mortgage to the bank for its benefit, together with any interest which may have been meantime collected thereon.

The Amory concession was in the form of a contract between Aguilar, Minister of Public Works, authorized by the President of the Republic, as party of the first part, and Miguel D. Ferrer, as the attorney of John M. Amory and Son, of 52 Broadway, New York, as party of the second part. The Chamber of Deputies of the Tinoco government approved the contract June 26, 1918. The concession is now owned by the Central Costa Rica Petroleum Company, Ltd., of Canada, and all its stock is owned by the British Controlled Oil Fields, Ltd. The concessionaire was given the right during twelve years to prospect or cause to be prospected the territories of the provinces of Cartago, Alajuela, Heredia and San Jose, constituting four of the eight provinces of Costa Rica, comprehending half her territory, in order to find deposits of petroleum, hydrocarbons and allied substances. On his finding them, the concessionaire was granted the exclusive right to locate all of the deposits discovered. At the end of twelve years, any territory

that might remain unexplored, or of which the concessionaire did not present topographical and geographical plans to the government, might be otherwise disposed of by the government for the mining of petroleum, hydrocarbons and allied substances. The concessionaire was granted the exclusive right during fifty years to develop and exploit the deposits located by him; to establish pipe lines and pumping stations; to erect refineries and bore wells; to build aqueducts, roads, railways, transmission lines and all other works necessary for the extracting, warehousing and handling of petroleum and allied substances; to use the national and public highways and the unoccupied land for such purpose; to utilize the rivers, springs, and water courses which may cross the national, municipal or private lands; to install hydraulic or electrical plants required by the company for the generating of electric power for this purpose; to cut and fell timber on national lands free of payment, and stone, slate, lime, clay, and other things that may be necessary for the operation of the enterprise, and to locate and mine such coal deposits as he might discover in his exploration. The enterprise was declared to be a public utility under the protection of the government so as to enable the concessionaire to exercise the right of expropriation for the purpose of the grant. He was given the right to export the petroleum and hydrocarbon products and by-products, or to sell the same within the republic.

The grant was made on condition that the concessionaire should spend $20,000 American gold in exploration during the first two years, and to deposit $25,000 in the public treasury to secure this expenditure; invest in the three years following the two years, not less than $125,000 gold in an investigation and exploitation of the petroleum deposits, and secure this action by the deposit of 40,000 colones in internal bonds of Costa Rica in the treasury at San Jose or in a bank in England or in the United States, and during seven years succeeding the previous five, invest a sum of not less than one million colones, to continue the work of investigation and exploitation, and deposit, as security for this, in the treasury of the republic, or in a bank of England or of the United States, 30,000 colones of the interior debt of Costa Rica; commence explorations within four months; use the best kind of machinery and methods for doing the work; organize a company called the Central Costa Rica Petroleum Company; transfer all the rights of the concessionaire to that company, as well as the obligations of the latter to Costa Rica, and organize the company within four years with a capital paid up of not less than one million dollars in United States currency.

The considerations for this concession are contained in Articles VII, VIII and X.

The concessionaire, by Article VII, agrees to pay 25 cents, American currency, on every ton of crude petroleum or other hydrocarbon products exported or sold in the republic, deducting what he may use in his work of production, refining and transport. By Article VIII he undertakes to sup-

ply gratuitously all fuel and lubricating oil needed to run the present government railways and extensions thereof, provided that the total net output from the petroleum fields shall be at least 1000 tons a day, the storage and transportation to be at the expense of the government. By Article X, it is provided as follows:

> With the exception of the oil supplied as provided by Article VIII hereof, the royalty of 25 cents referred to in Article VII, shall be the only tax or duty payable by the concessionaire to the Government of the Republic or to the local governments or municipalities in respect to this concession; but the concessionaire shall not be exempted from any national taxes payable by the public in general at the present rates. The government exempts the concessionaire from the payment of general or partial taxes which may be levied hereafter, unless they be for public services established or conducted by the government and of which the concessionaire shall make regular use, or by which he may directly and permanently benefit.

The first objection to an award in favor of the Amory concession in this proceeding by the British Government, is that it was granted to an American firm and that there is no evidence that British subjects were interested in it until after it had been repudiated, so that they acquire nothing but a law suit. It is urged that Great Britain may not protect her subjects in prosecuting a claim acquired from American owners after it had become the subject of controversy. The British case, presenting the Amory claim separately, says that British capital was engaged in the concession from the first, and that Amory & Son were only agents of a large English Company known as the British Controlled Oil-fields, Limited, and that all the capital has been furnished by that company since the concession was granted and work done under it. No formal proof is made of this. In a letter of the Secretary of State of Costa Rica to a representative of the British Government, of September 29, 1920, he says:

> When the Amory contract was being negotiated, assurance was given that the responsible firm was North American and documents presented to the Department of Public Works show that the transfer provided by the contract was made to a concern domiciled in the State of Delaware of the United States of America. In spite of this, and in view of the repeated assertions contained in the notes to which this is a reply, we now have no doubt that a part at least of the capital is English or of English origin, and that the interest that moves you to intervene in the matter is born of that circumstance.

No objection of this kind by Costa Rica was made in the Congressional resolution of the 13th of December, 1921, or, so far as I can discover, in previous correspondence. It appears for the first time in the counter case. Had it been clearly made in previous correspondence, the failure to make proof might have raised the question of law urged, but in view of the admission above and the lack of distinct challenge previous to the counter case, I cannot regard it as substantial.

Nor do I deem it necessary to go in detail into the question of performance. It seems to me that substantially everything was done by the concessionaires or their assignee required by the contract in the way of an advance of one million dollars of capital, of the security to be given, and of considerable expenditure to be made. The accounts show the actual outlay of at least 200,000 colones in exploration in Costa Rica, and of 300,000 colones in importation into the country of machinery and other preparation enough certainly to manifest good faith and to appeal for equitable treatment in case this concession cannot be sustained as a contract.

The most serious objection to the concession is that it was granted by a body without power to grant it. Its validity is, as I have already said, to be determined by the law in existence at the time of its granting; and that means the law of the government of Costa Rica under Tinoco. This concession was granted, with the approval of the President, by the Chamber of Deputies of Costa Rica. By the constitution of June 8, 1917, established under Tinoco, the Government of the Republic was vested in three different powers independent of each other, to be known as the legislative, the executive and the judicial powers. The legislative power was vested in a congress composed of two chambers, one of Senators and the other of Deputies, whose members in both were elected by the citizens and might be reelected indefinitely. By Article 76, the Congress was to meet as a single body and exercise ten powers, which were within its exclusive jurisdiction. The tenth power was as follows:

> 10. To approve or disapprove laws, fixing, enforcing or changing direct or indirect taxes.

The Chamber of Deputies was given the power to decree the alienation of property of the nation, or the application thereof for public uses; and especially to empower the executive to negotiate loans or to enter into other contracts upon mortgage security of the national revenue. The Senate was given the power to approve or disapprove the loan contracts which might be entered outside of the country, after the contract had been approved by the Chamber of Deputies; to approve or disapprove the contracts which the government might enter into, when on account of the nature and importance of the subject matter the executive power of the Chamber of Deputies, at the request of one-third of the members present, considered necessary the sanction of the Senate.

It is contended that this concession is a contract which the Chamber of Deputies might validly make and bind the government unless the executive or one-third of the members present should consider the sanction of the Senate necessary, and that as neither the executive power nor one-third of the votes of the members of the Chamber indicated its view that the sanction of the Senate was necessary to this concession, it was valid.

The recital of the concession shows that an important part of it dealt

with the future taxes to be paid by the concessionaire and made very especial provision in reference thereto. He was to pay a revenue tax of 25 cents United States currency on every ton of crude petroleum to be exported from Costa Rica or sold within its limits. This was called a revenue tax. In addition to this the concessionaire undertook to supply the government with combustible and lubricating oil for the existing railways or for any extension within the provinces named, if the product of the enterprise was not less than 1000 tons per day within a given period. Article X limited the taxes to be paid to the royalty of 25 per cent. and exempted the company from the payment of taxes to local governments or municipalities, and from all national taxes except those payable by the public in general at the rates existing at the time of the concession. It exempted the concessionaire from the payment of other general or partial taxes levied thereafter unless they were for public benefits furnished by the government of which the concessionaire should make regular use, or by which he might directly or indirectly benefit, *i.e.*, unless they were special assessments for actual benefits. Considering the very heavy burden to which but for these exemptions the company might have been subjected in the event of successful exploitation, they were a valuable part of the concession. It is evident that it was the hope and expectation of both parties that oil would be discovered and that upon its discovery the company would develop a large production, refining and transmission of oil, involving the expenditure of large capital and the investing of it in plants of millions of value. The protection which these clauses afforded against the heavy reduction of dividends by increased future taxes, was one of the great factors of value in the contract. It seems to be impossible to escape the conclusion that the power to grant such exemptions and to limit future taxation could only be exercised under the constitution of 1917 by Congress in a single body. The granting of this concession certainly involved the power to approve laws fixing, enforcing or changing direct or indirect taxes. As the Chamber of Deputies was expressly excluded from exercising this power alone, Article X was invalid.

It is urged that under the practical construction of the Tinoco constitution, the Chamber of Deputies did grant tax exemptions and five instances are cited from the official *Gazette* to show this. These were cases in which the customs duty on machinery introduced into the country was waived. They could hardly be held to amount to an amendment of the fundamental law by practice, or such a construction of it as to justify an exception by the Chamber of Deputies of *ad valorem* taxation, general and local, on the plant and property of the concessionaire for fifty years. My conclusion is supported by the action of President Tinoco himself in vetoing a law granting future exemptions from taxation to an insurance company enacted by the Senate, on the ground that only the Congress as a single body could grant them under its exclusive power to fix, enforce, or change direct or indirect taxes.

It is impossible to reject the Article X and hold the remainder of the concession valid. That article is too vital an element in its value. The contract cannot be made over by this tribunal for the parties.

The result is that the government of Tinoco itself could have defeated this concession on the ground of a lack of power in the Chamber of Deputies to approve it.

It is finally contended that the present Government of Costa Rica has recognized the Amory concession and thus given it validity. The argument rests upon correspondence between the attorney for the concessionaire and the Minister of Finance and Commerce in 1919 and 1920, in which the concessionaire was permitted to bring in certain machinery, duty free, for the exploration under the concession. Such permission was given but it was accompanied with the express reservation that the permission should not ratify the concession or affect the right of the government to declare a nullification of the franchises if deemed convenient.

My award, therefore, is that the Law of Nullities in its operation upon the validity of the 998 one thousand colones bills and the claim in behalf of the Royal Bank, will work no injury of which Great Britain can complain, if Costa Rica assigns all her interest in the mortgage for $100,000 upon Jose Joaquin Tinoco's estate executed by his widow, together with all interest paid thereon to the Royal Bank, and that, upon Costa Rica's executing this assignment and delivering the mortgage, the Royal Bank should deliver to the Government of Costa Rica the 998 one thousand colones bills held by it.

My award further is that the Law of Nullities in decreeing the invalidity of the Amory concession worked no injury to the Central Costa Rica Petroleum Company, Ltd., the assignee of the concession, and the British Controlled Oil Fields, Ltd., its sole stockholder, of which Great Britain can complain, because the concession was in fact invalid under the Constitution of 1917.

Article one of the treaty, under which this arbitration proceeds, provides that "the arbitrator shall determine what one party may owe the other for the expenses of the claim, and decide with regard to the payment of the expenses of the arbitration". Under the award, which is partly in favor of one and partly in favor of the other, I think it fair to require that each party pay its own expenses in maintaining its claims.

So far as the payment of the expenses of the arbitration is concerned, I know of none for me to fix. Personally, it gives me pleasure to contribute my service in the consideration, discussion and decision of the questions presented. I am glad to have the opportunity of manifesting my intense interest in the promotion of the judicial settlement of international disputes, and accept as full reward for any service I may have rendered, the honor of being chosen to decide these important issues between the high contracting parties.

MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY[1]

ADMINISTRATIVE DECISION NO. I

Dealing with the Liabilities of Germany on all Claims (save those expressly excepted) asserted by the United States in behalf of its Nationals

NOVEMBER 1, 1923

PARKER, Umpire, rendered the decision of the Commission, the American Commissioner and the German Commissioner being unable to agree:

As used herein the following terms shall be taken to have the meaning indicated below:

United States: the United States of America, and/or the Government of the United States of America;

Germany: the German Empire, and/or the Government of Germany;

Germany or her allies: the German Empire or the Austro-Hungarian Empire, Bulgaria, and/or Turkey;

War period: the period between August 1, 1914, and July 2, 1921, both inclusive, the latter date being that on which the joint resolution passed by the Congress of the United States declaring the war at an end became effective;

Period of neutrality: the period between August 1, 1914, and April 5, 1917, both inclusive;

Period of belligerency: the period between April 6, 1917, and July 2, 1921, both inclusive, the former date being that on which the joint resolution declaring a state of war to exist between Germany and the United States became effective;

American national: a person wheresoever domiciled owing permanent allegiance to the United States of America;

Treaty of Berlin: the treaty between the United States and Germany signed at Berlin August 25, 1921, restoring the friendly relations existing between the two nations prior to the outbreak of war;

Agreement: the agreement between the United States and Germany signed at Berlin August 10, 1922, entered into in pursuance of the Treaty of Berlin, providing for the creation of this Mixed Commission.

There are expressly excepted from this decision (1) claims of the United States as such against Germany, (2) claims based on debts owing to American nationals by Germany or by German nationals, and (3) claims arising out of the application of either exceptional war measures or measures of transfer as defined in paragraph 3 of the Annex to Section IV of Part X of the Treaty of

[1] Established in pursuance of the agreement between the United States and Germany of August 10, 1922. EDWIN B. PARKER, Umpire; CHANDLER P. ANDERSON, American Commissioner; WILHELM KIESSELBACH, German Commissioner; ROBERT W. BONYNGE, American Agent; KARL VON LEWINSKI, German Agent.

Versailles. These three excepted classes of claims (hereinafter referred to as "excepted claims") have not been referred to the Umpire for decision by the National Commissioners.

The financial obligations of Germany to the United States arising under the Treaty of Berlin on claims other than excepted claims, put forward by the United States on behalf of its nationals, embrace:

(A) all losses, damages, or injuries to them, including losses, damages, or injuries to their property wherever situated, suffered directly or indirectly during the war period, caused by acts of Germany or her agents in the prosecution of the war, provided, however, that during the period of belligerency damages with respect to injuries to and death of persons, other than prisoners of war, shall be limited to injuries to and death of civilians; and also

(B) all damages suffered by American nationals during the period of belligerency caused by:

(1) GERMANY through any kind of maltreatment of prisoners of war;

(2) GERMANY OR HER ALLIES and falling within the following categories:

(a) damage wherever arising to civilian victims of acts of cruelty, violence, or maltreatment (including injuries to life or health as a consequence of imprisonment, deportation, internment, or evacuation, of exposure at sea, or of being forced to labor), and to the surviving dependents of such victims;

(b) damage, in territory of Germany or her allies or in occupied or invaded territory, to civilian victims of all acts injurious to health or capacity to work, or to honor, and to the surviving dependents of such victims;

(c) damage to civilians by being forced to labor without just remuneration;

(d) damage in the form of levies, fines, and other similar exactions imposed upon the civilian population;

(e) damage in respect of all property (with the exception of naval and military works or materials) wherever situated, which has been carried off, seized, injured, or destroyed, on land, on sea, or from the air;

(3) ANY BELLIGERENT and falling within the following categories:

(a) damage directly in consequence of hostilities or of any operations of war in respect of all property (with the exception of naval and military works or materials) wherever situated;

(b) damage wherever arising to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of war, including bombardments or other attacks on land, on sea, or from the air, and all the direct consequences thereof, and of all operations of war.

The American Agent and the German Agent and their respective counsel will be governed by this decision in the preparation and presentation of all cases.

Done at Washington November 1, 1923.

EDWIN B. PARKER, *Umpire.*

Concurring:

CHANDLER P. ANDERSON,
American Commissioner.

ADMINISTRATIVE DECISION NO. II

Dealing with the Functions of the Commission and Announcing Fundamental Rules of Decision

NOVEMBER 1, 1923

PARKER, *Umpire*, delivered the opinion of the Commission, the American Commissioner and the German Commissioner concurring in the conclusions:

For the guidance of the American Agent and the German Agent and their respective counsel there are here set down some of the basic principles which will, so far as applicable, control the preparation, presentation, and decision of all cases submitted to the Commission. Reference is made to Administrative Decision No. I for the definition of terms used herein.

Functions of Commission.—This Commission was established and exists in pursuance of the terms of the Agreement between the United States and Germany dated August 10, 1922. Here are found the source of, and limitations upon, the Commission's powers and jurisdiction in the discharge of its task of determining the amount to be paid by Germany in satisfaction of her financial obligations to the United States and to American nationals under the Treaty of Berlin. Article I of the Agreement provides that:

> The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:
>
> (1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;
>
> (2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;
>
> (3) Debts owing to American citizens by the German Government or by German nationals.

The financial obligations of Germany which this Commission is empowered to determine arise out of claims presented by the United States falling within the several categories specified in the Agreement and more particularly defined or described in the Treaty of Berlin. For this more particular definition as applied to claims (other than excepted claims) against Germany asserted by the United States on behalf of its nationals reference is made to the decision of the umpire as embraced in the Commission's Administrative Decision No. I.

The Commission is not concerned with the Treaty of Versailles as such, but only with those of its provisions which have been incorporated by reference into the Treaty of Berlin. While for convenient designation reference will be made herein to the Treaty of Versailles, it will be under-

stood (unless the context plainly indicates the contrary) that such reference is to such of the provisions of the Treaty of Versailles as constitute a part of the Treaty of Berlin.

The machinery provided by the Treaty of Versailles and the rules and methods of procedure thereunder governing the disposition of claims may be applied by but are not binding on this Commission.

It does not, of course, follow that every "claim" presented to the Commission constitutes a "financial obligation" of Germany. The American Agent pursues the policy of giving American nationals the benefit of every doubt and presents all claims that are not frivolous. Therefore at the threshold of the consideration of each claim is presented the question of jurisdiction, which obviously the Commission must determine preliminarily to fixing the amount of Germany's financial obligations, if any, in each case.[2]

When the allegations in a petition or memorial presented by the United States bring a claim within the terms of the treaty, the jurisdiction of the Commission attaches. If these allegations are controverted in whole or in part by Germany, the issue thus made must be decided by the Commission. Should the Commission so decide such issue that the claim does not fall within the terms of the treaty, it will be dismissed for lack of jurisdiction. But if such issue be so decided that the claim does fall within the terms of the treaty, then the Commission will prescribe the measure of damages, apply such measure to the facts in the particular case as the Commission may find them, and fix the financial obligation of Germany therein. The Commission's task is to apply the terms of the Treaty of Berlin to each case presented, decide those which it holds are within its jurisdiction, and dismiss all others.

The Commission is not concerned with the *payment* by Germany of its financial obligations arising under the treaty. Its task is confined solely to fixing the amount of such financial obligations.

Principles governing Commission.—In its adjudications the Commission will be controlled by the terms of the Treaty of Berlin. Where no appli-

[2] *History and Digest of the International Arbitrations to which the United States Has Been a Party*, by John Bassett Moore, 1898 (hereinafter cited as "Moore's Arbitrations"): Volume I, pages 324–327, Volume III, Chapter LII, pages 2277–2312, and page 2599; *International Law Chiefly as Interpreted and Applied by the United States*, by Charles Cheney Hyde, 1922 (hereinafter cited as "Hyde"), section 577 (Volume II, page 153) and authorities cited in notes; *Papers Relating to the Foreign Relations of the United States*, 1895, Part I, pages 83–84, letter from Mr. Olney, Secretary of State, to Mr. Gana, Minister of Chile, June 28, 1895; discussion of the right of a commission to pass upon its own jurisdiction in *International Arbitral Law and Procedure* by Jackson H. Ralston, 1910 (hereinafter cited as "Ralston"), sections 26–30, inclusive; Comegys and Pettit *v.* Vasse, 1828, 1 Peters (26 U. S.) 193, 212–213; *The Diplomatic Protection of Citizens Abroad or The Law of International Claims*, by Edwin M. Borchard, 1915 (1922) (hereinafter cited as "Borchard"), section 191; *A Digest of International Law*, by John Bassett Moore, 1906 (hereinafter cited as "Moore's Digest"), Volume VII, section 1073.

cable provision is found in that instrument, in determining the measure of damages the Commission may apply:[3]

(a) International conventions, whether general or particular, establishing rules expressly recognized by the United States and Germany;

(b) International custom, as evidence of a general practice accepted as law;

(c) Rules of law common to the United States and Germany established by either statutes or judicial decisions;

(d) The general principles of law recognized by civilized nations;

(e) Judicial decisions and the teachings of the most highly qualified publicists of all nations, as subsidiary means for the determination of rules of law; but

(f) The Commission will not be bound by any particular code or rules of law but shall be guided by justice, equity, and good faith.

The United States is claimant.—Though conducted in behalf of their respective citizens, governments are the real parties to international arbitrations.[4] All claims, therefore, presented to this Commission shall be asserted and controlled by the United States as claimant, either on its own behalf or on behalf of one or more of its nationals. If in the decisions, opinions, and proceedings of the Commission American nationals are referred to as claimants it will be understood that this is for the purpose of convenient designation and that the Government of the United States is the actual claimant.

Original and continuous ownership of claim.—In order to bring a claim (other than a Government claim) within the jurisdiction of this Commission, the loss must have been suffered by an American national, and the claim for such loss must have since continued in American ownership.[5]

[3] Article 38 of the Statute for the Permanent Court of International Justice, 1920, Proceedings of the American Society of International Law, 1920, page 65; *International Law*, by L. Oppenheim, 3rd edition, 1920 (hereinafter cited as "Oppenheim"), Volume II, section 15, page 19; *The Rights of War and Peace*, by Hugo Grotius, Whewell translation, 1853 (hereinafter cited as "Grotius"), Book III, Chapter XX, sections 46–48; Hyde, section 559; II Moore's Arbitrations, page 1226; *Venezuelan Arbitrations of 1903*, report by Jackson H. Ralston, 1904 (hereinafter cited as "Venezuelan Arbitrations 1903"), opinion of Umpire Plumley in Aroa Mines (Limited) Case before British-Venezuelan Mixed Claims Commission, pages 386–387; Eldredge's Case before American-Peruvian Mixed Commission of 1863, IV Moore's *Arbitrations*, page 3462; Cadiz Case before United States and Venezuelan Commission, 1885, IV Moore's *Arbitrations*, page 4203.

[4] La Abra Silver Mining Company *v.* Frelinghuysen, 1884, 110 U. S. 63, 71–72; Hyde, section 273; Ralston, section 201; Borchard, sections 139, 140, 145, 146, 147, and 152; VI Moore's Digest, sections 973–978.

[5] III Moore's Arbitrations: Morrison *v.* Mexico, 1850, page 2325; Young's case, 1851, page 2752; Wiltz *v.* United States, 1882, page 2254; Abbiatti *v.* Venezuela, 1885, pages 2347–2348. Borchard, sections 306–310; Ralston, sections 220–226; VI Moore's Digest, sections 979 and 981; Burthe *v.* Denis, 1890, 133 U. S. 514; Venezuelan Arbitrations 1903: British-Venezuelan Mixed Claims Commission, Plumley, Umpire, Stevenson Case, pages

The enquiry is: Was the United States, which is the claimant, injured through injury to its national? It was not so injured where the injured person was at the time of suffering the injury a citizen of another state. While naturalization transfers allegiance, it does not carry with it existing state obligations. Any other rule would convert a nation into a claim agent in behalf of those availing of its naturalization laws to become its citizens after suffering injury.[6]

Apportionment of awards amongst claimants.—As above stated, it is the province of this Commission to adjudicate claims presented by the United States, on its own behalf and on behalf of its nationals, against Germany falling within the several categories defined or described in the Treaty of Berlin.

The primary purpose of such adjudication is to determine the amount of Germany's financial obligations to the United States under the treaty.[7] Obviously, Germany is concerned only with the amount of her obligations and not with any distribution which may be made by the United States of such amount when paid. But both Governments are directly interested in, and this Commission in passing upon its jurisdiction must determine, the ownership of each claim at and since its inception.

In that class of claims where two or more are joined as claimants in one case because their respective causes of action are based upon a single occurrence, and where their demands are several rather than joint, this Commission must, after disposing of all jurisdictional questions, determine how much *each* claimant is entitled to recover before the aggregate amount of the award in that case can be fixed.

To illustrate: Claims growing out of injuries resulting in death are not asserted on behalf of the *estate* of the deceased, the award to be distributed according to the provisions of a will or any other fixed or arbitrary basis. The right to recover rests on the direct personal loss, if any, suffered by each of the claimants. All issues with respect to parties entitled to recover, as well as issues involving the measure of damages, are determined, not by the law of the domicile of the deceased, but in private or municipal jurisprudence

438, 442–455; Italian-Venezuelan Mixed Claims Commission, Ralston, Umpire, Brignone Case, pages 710, 720, Miliani Case, pages 754, 759–762; Corvaïa Case, pages 782, 809, Poggioli Case, pages 847, 866.

The language of the Treaty of Berlin does not bring a claim which America is presenting on behalf of its nationals within the exception to the general rule announced by Barge, Umpire, in the Orinoco Steamship Company Case, Venezuelan Arbitrations 1903, at pages 84–85.

[6] The rule here laid down will not preclude the presentation by the American Agent and the consideration by this Commission of the claims, if any, of citizens of the Virgin Islands and others similarly situated, who, after suffering damages through the act of Germany or her agents, became American nationals through the acquisition of territory by the United States and not on their own initiative.

[7] See Preamble to Agreement; Frelinghuysen *v.* United States, 1884, 110 U. S. 63.

by the law of the place where the tort was committed[8]—*here* by the law of nations and the application of the governing principles above announced. The *rules* for measuring the damages suffered by each claimant are the same. But those rules must be separately applied to the circumstances and conditions, not only of the deceased but of each claimant as well, to arrive at the *quantum* of damages suffered by each claimant. This process necessarily involves a determination of the amount to be awarded each claimant rather than the aggregate amount of Germany's liability for the loss of a life. The problem in such cases is, not to distribute a given amount assessed against Germany amongst several persons, but to assess separately the damages suffered by each of such persons who jointly present independent claims. This the Commission will do.

In so doing we are mindful of expressions used in the opinions of the Supreme Court of the United States to the effect that one claiming an award made by an international tribunal in favor of another is bound by the decision of such tribunal as to the validity of the claim and the amount of the award *but not as to the ownership thereof*.[9]

The suggestion that under the rule announced by these authorities this Commission is without jurisdiction to apportion its awards amongst several joined as claimants in one case is due to a misapprehension of the exact point decided. These authorities deal not with the *original* claimants' *primary right to recover* but with conflicts over asserted rights to *receive payment* arising (1) between the original claimants and those claiming under them or (2) between two or more whose rights are derivative, not original, claiming through assignments or transfers, voluntary or involuntary, from the orig-

[8] Spokane and Inland Empire Railroad Company *v.* Whitley, 1915, 237 U. S. 487, 495, opinion by Mr. Justice Hughes; Northern Pacific Railroad Company *v.* Babcock, 1894, 154 U. S. 190, 197–199, opinion by Mr. Justice White; American Banana Company *v.* United Fruit Company, 1909, 213 U. S. 347, 356, opinion by Mr. Justice Holmes; Story on *Conflict of Laws*, 7th edition, 1872, section 307; Wharton on *Conflict of Laws*, 3rd edition, 1905, section 478.

[9] See Comegys and Pettit *v.* Vasse, 1828, 1 Peters (26 U. S.)193, 212; Frevall *v.* Bache, 1840, 14 Peters (39 U. S.) 95, 97; Judson *v.* Corcoran, 1855, 17 Howard (58 U. S.) 612, 614; Phelps *v.* McDonald, 1879, 99 U. S. (9 Otto) 298, 307; Frelinghuysen *v.* Key, 1884, 110 U. S. 63, 71; Leonard *v.* Nye, 1878, 125 Massachusetts 455, 466; Brooks *v.* Ahrens, 1888, 68 Maryland 212, 221; Heard *v.* Sturgis, 1888, 146 Massachusetts 545, 547, and (Williams *v.* Heard, 1891) 140 U. S. 529, 539–540; Kingsbury *v.* Mattocks, 1889, 81 Maine 310, 315; Taft *v.* Marsily, 1890, 120 New York 474, 477.

It is worthy of note that in the first three of these cases the court was construing the powers not of mixed arbitral tribunals, but of American commissions created under Acts of Congress to distribute a lump sum paid to or held by the United States under treaties between the United States on the one part and Spain, France, and Mexico, respectively, on the other. It is also worthy of note that in none of these cases was there any question of the commission's jurisdiction involved, and in each of them the Supreme Court held that the particular claimant to whom the commission's award was made was entitled to receive payment. The question, therefore, as to the commission's jurisdiction to make the award did not affect the result in any one of these cases.

inal claimants. All of the authorities cited in effect recognize the exclusive and final power of international arbitral tribunals to determine *in whom* a cause of action originally vests, as well as to determine all other questions involving its validity and the amount recoverable. They hold that these are issues to be decided by the international tribunal according to the law of nations, *but* that all questions involving the transfer of interest from and through the original owner must be decided by municipal tribunals according to local jurisprudence.

To this rule we unqualifiedly subscribe.[10] But it does not relieve us of the duty of deciding the amount which shall be awarded to each of two or more who join in asserting in any one case their claims, not joint but several in their nature, and whose rights to recover and the amount recoverable depend on the terms of the treaty and the rules of applicable international law.

Losses suffered directly or indirectly.—Numerous counsel pressing claims of American nationals presented by the American Agent urge in substance that under section 5 of the resolution of Congress and also under Article 231 of the Treaty of Versailles, both carried into and made a part of the Treaty of Berlin, Germany is, during the entire war period, (in the language of one of the American counsel) "responsible for all damage or loss in consequence of the war, no matter what act or whose act was the immediate cause of the injury". This contention is rejected.

From the decision of the Umpire set forth in Administrative Decision No. I, handed down this day, it is apparent that during the period of belligerency Germany is liable for damages suffered by American nationals caused by Germany's allies or by any belligerent when the damages fall within defined categories enumerated under division (B) of that decision. But leaving out of consideration claims falling within these defined categories, Germany's liability for losses sustained by American nationals falling within the provisions of division (A) of Administrative Decision No. I is limited to losses "caused by acts of Germany or her agents". The applicable provisions of Administrative Decision No. I are for convenience reproduced as follows:

> The financial obligations of Germany to the United States arising under the Treaty of Berlin on claims other than excepted claims, put forward by the United States on behalf of its nationals, embrace:
>
> (A) all losses, damages, or injuries to them, including losses, damages, or injuries to their property wherever situated, suffered directly or indirectly during the war period, caused by acts of Germany or her agents in the prosecution of the war, provided, however, that during the period of belligerency damages with respect to injuries to and death of persons, other than prisoners of war, shall be limited to injuries to and death of civilians.

The contentions and arguments pressed by American counsel which are here rejected will be examined in the light of the provisions of the decision

[10] Grotius, Book III, Chapter XX, Section 48.

above quoted and also in the light of the provisions of section 5 of the joint resolution of Congress and Article 231 of the Treaty of Versailles.

Much stress is laid by American counsel upon the provisions of section 5 of the resolution of Congress and particularly upon the language italicized in the succeeding sentence. That section, among other things, provides in substance that the United States shall retain (unless otherwise theretofore or thereafter expressly provided by law) all property of Germany or its nationals or the proceeds thereof held by the United States or any of its officers, agents, or employees from any source or by any agency whatsoever, until such time as Germany shall have made "suitable provision for the satisfaction of all claims against" Germany of American nationals who have since July 31, 1914, "suffered, through the acts of the Imperial German Government, or its agents, . . . loss, damage, or injury to their persons or property, *directly or indirectly*, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, *or in consequence of hostilities or of any operations of war, or otherwise*". Examining this language to ascertain what claims are embraced within its terms, it appears that such nationals must have suffered:

A. (Cause?) through the acts of Germany or its agents;
B. (When ?) between August 1, 1914, and July 2, 1921, both inclusive;
C. (What ?) loss, damage, or injury to their persons or property
    (1) directly *or*
    (2) indirectly, whether
        (a) through the ownership of shares of stock in any domestic or foreign corporation;
        (b) in consequence of hostilities or
        (c) of any operations of war, or
        (d) otherwise.

The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence* of *that act* must have been the loss, damage, or injury suffered. The *capacity* in which the American national suffered—whether the act *operated* directly on him, or indirectly as a stockholder *or otherwise*, whether the subjective nature of the loss was direct or indirect—is immaterial, but the *cause* of his suffering must have been the act of Germany or its agents. This is but an application of the familiar rule of proximate cause—a rule of general application both in private and public law—which clearly the parties to the treaty had no intention of abrogating. It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act. But the law can not consider, the Congress of the United States in adopting

its resolution did not consider, the parties in negotiating the treaty of Berlin did not consider or expect this tribunal to consider, the "causes of causes and their impulsion one on another." [11] Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed. The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?

It follows from the analysis of section 5 of the resolution of Congress that the contention of American counsel, based on the provisions of that section, must be rejected. The argument, pressed to its logical conclusion, would fix liability on Germany for all increased living costs, increased income and profits taxes, increased railroad fares and freights, increased ocean freights, losses suffered through the Russian revolution—in a word, for *all* costs or consequences of the war, direct or remote, to the extent that such costs were paid or losses suffered by American nationals. Going one step further, if there be applied to the word "otherwise" found in section 5 of the resolution as a part of the phrase "or in consequence of hostilities or of any operations of war, or otherwise" the same rules of construction as American counsel applies to the balance of that phrase, then it would follow that Germany is liable for all losses of every nature, no matter if the cause was entirely foreign to the war, wheresoever and howsoever suffered by American nationals since July 31, 1914. The mere statement of the extreme lengths to which the interpretation we are asked to adopt carries us demonstrates its unsoundness.

Neither can the argument of American counsel find support by a resort to the provisions of Article 231 of the Versailles Treaty, the first article of the reparation clauses of that treaty. That article provides that:

> The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.

But Articles 232 provides that:

> The Allied and Associated Governments recognize that the resources of Germany are not adequate . . . to make complete reparation for all such loss and damage.
>
> The Allied and Associated Governments, however, require, and Germany undertakes, that she will make compensation for all damage

[11] Lord Bacon's *Maxims of the Law.*

done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general all damage as defined in Annex I hereto.

Annex I provides that "Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories". Then follows an enumeration of ten categories, including three, numbered 5, 6, and 7, which deal with reimbursement to the Government of the United States as such of the cost of pensions and separation allowances, rather than damages suffered by the "civilian population". The Government of the United States has expressly committed itself not to press against Germany the claims arising under these three categories and no such claims are before this Commission.[12]

It is manifest that Article 231 is qualified and limited by the provisions of Article 232 and the Annex I pertaining thereto, which in express terms recognize the inadequacy of Germany's resources to make complete reparation for all loss and damage suffered as a consequence of the war and limit the obligation of Germany to making compensation to the civilian population of the Allied and Associated Powers for such damages as fall within the terms of Article 232 and Annex I. Clearly the United States is not in a position to base a claim on an isolated provision of the treaty without reading it in connection with all related provisions to ascertain its meaning and intent. Especially is this true in view of the second paragraph of sub-

[12] When the treaty of Berlin was before the Senate of the United States, Senator Walsh of Montana moved to strike from it these provisions obligating Germany to reimburse the United States for pension and separation allowances paid by the latter. He said, *inter alia* (page 6367, Volume 61, *Congressional Record*), "at the conference of Versailles an insistent demand was made by certain of the Allies to exact compensation of Germany for all damages occasioned by the war; and . . . after the debate progressed before the Versailles conference, the contention was finally abandoned by every one of them, and it was agreed that the compensation to be exacted of Germany should be limited to the damage which was done to the civilian population. . . . I challenged anyone to attempt to defend pensions and separation allowances as damages done to the civilian population, and no one has attempted so to defend them."

At this point Senator Shortridge, of California, asked Senator Walsh in substance if he feared or thought that the United States, "by whomsoever guided or directed," will ever make a demand on Germany for the payment of pensions and separation allowances, in effect expressing the opinion that such a contingency was so remote as to make of no consequence the objection of Senator Walsh to the treaty as it stood. This opinion expressed by Senator Shortridge, which was not challenged and which, as appears from the debates, expressed the view held by the Senate, was fully justified when the President of the United States authorized the statement that he had no intention of pressing against Germany or presenting to this Commission any claims falling within paragraphs 5, 6, and 7 of Annex I to Section I of Part VIII of the treaty of Versailles. See exchange of notes between Chancellor Wirth and Ambassador Houghton of August 10, 1922, printed in connection with the agreement between the United States and Germany providing for the creation of this Commission and submitted to the Congress of the United States, Treaty Series 665.

division (1) of Article II of the Treaty of Berlin, which provides that the United States in availing itself of the rights and advantages stipulated for its benefit in the provisions of the Versailles Treaty read by reference into the Treaty of Berlin "will do so in a manner consistent with the rights accorded to Germany under such provisions."

Article 231 of the Versailles Treaty at most amounts to no more than an acceptance by Germany of the affirmance by the Allied and Associated Governments of Germany's responsibility for all loss and damage suffered as a consequence of the war—*a moral responsibility.* Germany's *financial responsibility* for losses occurring during belligerency is limited and clearly defined in the succeeding article and the annex pertaining thereto and other provisions of the treaty.

Applying the rule of proximate cause to the provisions of Administrative Decision No. I, no difficulty should be experienced in determining what claims fall within its terms.

Done at Washington November 1, 1923.

EDWIN B. PARKER, *Umpire.*

Concurring in the conclusions:

CHANDLER P. ANDERSON,
American Commissioner.

W. KIESSELBACH,
German Commissioner.

IN THE MATTER OF THE CESSIONS BY GERMANY TO CZECHO-SLOVAKIA UNDER ARTICLE 339 OF THE TREATY OF VERSAILLES

Walker D. Hines, Arbitrator

Decided, Paris, June 14, 1921

Article 339 of the Treaty of Versailles provides that Germany shall cede to the Allied and Associated Powers concerned certain property pertaining to navigation on certain river systems specified in Article 331 of the treaty. Article 339 provides that the amount and specifications of such cessions shall be determined by an arbitrator or arbitrators appointed by the United States of America. The undersigned, Walker D. Hines, has been appointed accordingly as the Arbitrator for the purpose of Article 339.

One of the river systems specified in Article 331 is the river system of the Elbe. Czecho-Slovakia claims that by virtue of Article 339 it is entitled to cessions of property pertaining to navigation on the Elbe.

Czecho-Slovakia and Germany, respectively, have designated delegates to appear before the Arbitrator, and he has received and considered the various notes presented by the respective delegates, and has held numerous hearings which were attended by these delegates.

THE RIGHT OF CZECHO-SLOVAKIA TO RECEIVE CESSIONS OF BOATS AND OTHER MATERIAL ON THE ELBE UNDER ARTICLE 339 OF THE TREATY OF VERSAILLES

The German Delegation urges that Czecho-Slovakia has no right to receive cessions of boats and other material on the Elbe. The position of the German Delegation is that the purpose of Article 339 was to provide for a cession of boats and other material only in cases where the Treaty of Versailles had brought about territorial changes; that in respect of the Elbe the treaty had made no territorial changes affecting Germany, and, therefore, it was not the purpose of Article 339 to impose upon Germany the obligation of making to Czecho-Slovakia any cessions of Elbe navigation material. The German Delegation urged that its position was illustrated by Article 357, which required cessions to be made to France because of the fact that the Treaty of Versailles had caused a territorial change through the restoration of Alsace-Lorraine to France.

The Arbitrator is of the opinion that Article 339 in its literal meaning embraces Czecho-Slovakia in respect of the Elbe, because Czecho-Slovakia by reason of its location upon the Elbe is a power directly concerned in the navigation of that stream. The concern of Czecho-Slovakia in the navigation of the Elbe is further recognized by Article 363 of the treaty, which gives Czecho-Slovakia a free zone for ninety-nine years in the port of Hamburg at the mouth of the Elbe.

The Arbitrator finds nothing in the history of the treaty provisions to place any limitations in this respect upon the literal meaning of Article 339. It appears to have been the underlying purpose of the treaty to provide for the cession of navigation material to the Allied and Associated Powers newly created or receiving enlarged territory as a result of the peace settlement.

While incidents connected with the drafting of Article 339 would not in themselves control the construction of the Article, it may be mentioned that the German Delegation requested the Arbitrator to ascertain the facts relative to the drafting of the provision. The Arbitrator has done so, and finds that orginally a separate article was contemplated providing for cessions by Germany to Czecho-Slovakia, but it then seems to have been decided that in the interest of brevity an article expressed in the general terms of Article 339 would cover not only the Elbe, but also the other rivers mentioned in Article 331.

The Arbitrator, therefore, concludes that, in respect of the Elbe, Czecho-Slovakia comes within the scope and purpose of Article 339, and is entitled to cessions thereunder, in accordance with its legitimate needs.

THE TRAFFIC TO BE CONSIDERED IN ESTIMATING THE LEGITIMATE NEEDS OF THE TWO COUNTRIES

Article 339 requires in effect that Germany shall cede to Czecho-Slovakia tugs and vessels, together with their fittings and gear, in good state of repair,

in condition to carry goods on the Elbe, and selected from among those most recently built; and that such cessions shall be determined with due regard to the legitimate needs of the parties concerned, and particularly with reference to the shipping traffic during the five years preceding the war.

The two delegations have agreed to accept the traffic for the year 1913 in lieu of the traffic for the five years preceding the war. The Arbitrator believes that this agreement is a reasonable and convenient method of dealing with the problem, and, therefore, adopts the traffic of the year 1913 as the basis for his consideration of the legitimate needs of the two parties. Annex I hereto attached shows the amount of the 1913 traffic on the Elbe as agreed to by the two parties and as adopted by the Arbitrator.

RECTIFICATIONS OF THE BASIC TRAFFIC

Czecho-Slovakia claims that a very substantial amount ought to be added to the basic traffic of 1913 because of the fact that in the future a large traffic will move by the Elbe to and from Czecho-Slovakia which prior to the war moved via Trieste and Fiume. It is claimed that prior to the war the Austrian Empire embraced Trieste and the principal manufacturing portion of Czecho-Slovakia, and the Hungarian Monarchy embraced Fiume and the remaining portion of Czecho-Slovakia, and as a result that transportation took place between those ports and points in Czecho-Slovakia without crossing frontiers, and that the railroad rates were unusually favorable at that time to such transportation, but that in the future the result will be that several frontiers will have to be crossed if such traffic moves via Trieste and Fiume to or from Czecho-Slovakia, and it will be impossible to secure as favorable railroad rates as were obtainable before the war, and as a result this traffic will move via Hamburg.

The Arbitrator is of the opinion that extreme caution should be used by him in modifying the pre-war figures. It was evidently the purpose of the treaty to make the pre-war figures the principal basis for determining the legitimate needs of the parties. Moreover, the future changes in the traffic are highly speculative as to amount. If the Arbitrator in response to the Czecho-Slovak demand should enter the speculative field and make rectifications in the 1913 traffic beyond those which are indicated in a clear and convincing manner, he would probably find in the same speculative field the necessity for considering various offsetting rectifications in favor of Germany with respect to other forms of traffic which could probably be urged with corresponding plausibility (for example, it is suggested by Germany that the brown coal traffic from Czecho-Slovakia to Germany may diminish in future years).

The Arbitrator, therefore, feels that he should make no rectifications on account of traffic formerly moving via Trieste and Fiume, except where a very high degree of probability is established that such traffic will move via Hamburg in the future, particularly in view of the tendency of the ports of

Trieste and Fiume to hold their traffic on account of their splendid equipment and on account of the skill and knowledge of their commercial firms. Elaborate presentations have been made by both delegations on this question. After careful consideration of all that has been submitted, and bearing in mind the necessity for resolving doubts against modifications of the prewar figures, the Arbitrator decides that on account of the Fiume and Trieste traffic which is likely to move via Hamburg and the Elbe in the future, there should be a rectification of 300,000 tons, of which 150,000 tons will be treated as imports and added to the Hamburg-Aussig transit traffic shown in Annex I, and 150,000 tons will be treated as exports and added to the Aussig-Hamburg transit traffic shown in Annex I.

AMOUNT OF SHIPPING REQUIRED TO PERFORM CZECHO-SLOVAKIA'S PART OF THE TRAFFIC THUS ADOPTED

This subject involves the question as to what part of the traffic should move in Czecho-Slovak boats, and as to how many boats would be required to transport that part.

It is clear that as to the traffic beginning and ending in Czecho-Slovakia, *i.e.*, its strictly internal traffic, Czecho-Slovakia should have boats sufficient to carry 100% of that traffic.

As to traffic between Czecho-Slovak ports and German Elbe ports (called Middle Elbe for convenience), above Hamburg, Czecho-Slovakia claims that each country should have 100% of the boats necessary to carry traffic originating in its own territory, while Germany claims that each country should have 50% of the boats necessary to carry the traffic in both directions, upstream and downstream.

Broadly speaking, all transportation between Czecho-Slovak localities and German localities must involve the cooperation of nationals of the two countries. A Czecho-Slovak seller cannot send his commodities to Germany without finding a German buyer. In view of this essentially joint participation of the two countries in all of these transactions, the Arbitrator feels that the reasonable and proper method is to allow each of the two countries 50% of the boats for carrying traffic in which the two countries are jointly interested.

The Arbitrator had to consider a similar question in his determination (made January 8, 1921) in the matter of cessions by Germany to France under Article 357 of the Treaty of Versailles. In that case he reached the same conclusion as is above indicated, *i.e.*, that each country should be regarded as having the legitimate need to control 50% of the boats for the purpose of carrying such joint traffic.

As to traffic between Czecho-Slovakia and Hamburg which has its origin or destination overseas, the Czecho-Slovak Delegation claims 100% of the boats necessary to carry the entire traffic, whereas Germany claims that each nation should have 50% of the necessary boats. Czecho-Slovakia claims

that Germany has no interest in or control over this traffic since it originates or is destined overseas and will have the privilege of using the facilities at Hamburg which will be allowed to Czecho-Slovakia in the free zone provided for in Article 363. Germany claims that this traffic is principally in the hands of German firms, although neither origin nor destination is in Germany. The Arbitrator is of the opinion that it should be regarded as a legitimate need of Czecho-Slovakia to control 100% of the boats necessary to perform this traffic.

As to traffic between Czecho-Slovakia and Hamburg, other than overseas traffic last mentioned, the same principle controls as in the case of traffic between Czecho-Slovakia and the Middle Elbe, and, therefore, it is a legitimate need of each country to have 50% of the boats necessary to carry the traffic.

The next point is to decide upon the necessary factors to be employed in arriving at the amount of tonnage and horse-power requisite to be ceded to Czecho-Slovakia in order that it may carry the traffic allotted to it according to the foregoing facts and principles. These factors are:

(*a*) The number of days of service per year for barges and tugs, respectively;

(*b*) The number of tons per horse-power which the tugs will pull upstream on the various stretches of the river;

(*c*) The average percentage of utilization of the cargo capacity of the barges;

(*d*) The times required for tugs to make their round trip voyages on the various stretches of the river, and the times required for the barges to make their round trip voyages, and the time to be allowed for loading and unloading of barges.

The two delegations have applied themselves most diligently to a study of these problems. They have agreed on numerous factors.

They have been unable to agree upon some, and as to them it has been necessary for the Arbitrator and his Executive Assistant to give most careful attention to the arguments of the two delegations.

It is unnecessary to complicate this determination with a discussion of the technical details involved. The Arbitrator has concluded that in principle the amount of tonnage and horse-power which would be required to enable Czecho-Slovakia to transport that part of the traffic which its legitimate needs entitle it to transport would be 261,000 tons of barge capacity and 17,800 horse-power of tug capacity.

THE AMOUNT OF SHIPPING WHICH IN PRACTICE SHOULD BE REGARDED AS THE LEGITIMATE NEED OF CZECHO-SLOVAKIA IN VIEW OF SURRENDER FOR RESTITUTION AND REPARATION AND OF OTHER CONDITIONS AFFECTING THE SHIPPING ON THE ELBE

The legitimate need of Czecho-Slovakia for shipping on the Elbe should be decided in the light of the amount of shipping that will remain on the Elbe after Germany makes under the Treaty of Versailles the necessary cessions for reparation and any necessary restitutions. Indeed, that treaty expressly provides that the amount of tugs and vessels to be ceded by Germany must be specified out of those which remain registered in the German Elbe ports

after the deduction of the tugs and vessels surrendered by way of restitution and reparation.

Units surrendered or to be surrendered for restitution need not be considered, because they are not counted as a part of the German river fleet.

The Reparation Commission has certified to the Arbitrator the size of the entire German river fleet as of November 11, 1918, and has also certified to the Arbitrator the losses incurred by the Allied and Associated Powers for which reparation is to be made by a cession of a part of the German river fleet. Annex III of Part VIII of the Treaty of Versailles provides that the conditions of cession for purposes of reparation shall be settled by the Arbitrator. He has accordingly prescribed such conditions of cession and under these conditions of cession the Arbitrator assumes the function of selecting from the entire river fleet of Germany the boats to be ceded for purposes of reparation. By virtue of the Arbitrator's functions and action in this matter, the Arbitrator knows that not more than 187,000 tons of barges registered in ports of the Elbe and not more than 330 horse-power of tugs registered in ports of the Elbe will have to be ceded by Germany to the Reparation Commission to make good the losses in inland navigation tonnage incurred during the war by the Allied and Associated Powers.

Appendix II hereto attached shows the fleet of tugs and vessels on the Elbe as agreed to by the Czecho-Slovak and German Delegations in the present proceeding.

The Arbitrator, therefore, decides that, after restitution and reparation, all of the tugs and vessels shown in such Appendix will remain registered in the ports of the Elbe, except not exceeding 187,000 tons of barges and 330 horse-power of tugs, which is the maximum of such barges and tugs that will be surrendered by Germany by way of restitution or reparation.

In the light of this decision as to the tugs and vessels remaining registered in the ports of the Elbe after the deduction of the maximum amount which can be surrendered by Germany by way of restitution or reparation, and bearing in mind also the slight rectification which has been made in the basic traffic, the Arbitrator decides that Czecho-Slovakia ought to have, in order fairly to meet its legitimate needs on the Elbe, 223,300 tons of barges and 17,720 horse-power of tugs.

The Arbitrator also decides that Czecho-Slovakia ought to have, in order fairly to meet its legitimate needs on the Elbe, 1890 horse-power of harbor tugs and 1,346 tons of freight boats.

THE AMOUNT OF SHIPPING TO BE PROVIDED FOR CZECHO-SLOVAKIA AFTER DEDUCTION OF SHIPPING ALREADY REGISTERED IN CZECHO-SLOVAK PORTS AND CONTROLLED BY CZECHO-SLOVAK NATIONALS; AND THE PROCEDURE FOR REMOVING COMPLICATIONS AND SELECTING SUCH SHIPPING

It appears that there are 50,200 tons of barges and 2,720 horse-power of tugs already registered in Czecho-Slovak ports on the Elbe and controlled by

Czecho-Slovak nationals and it is clear that to the extent of this amount of shipping the legitimate needs of Czecho-Slovakia are already met.

The question remains as to the manner in which provision shall be made for the remaining 173,100 tons of barges and 15,000 horse-power of tugs which are necessary in order to meet in practice the legitimate needs of Czecho-Slovakia as determined by the Arbitrator.

Czecho-Slovakia urges that in the first instance its legitimate needs should be satisfied: (1) by the transfer to it of all the tugs, vessels and other property of the Austrian Northwest Elbe Shipping Company, which is controlled by German capital, but a large proportion of whose vessels and tugs are registered in Czecho-Slovak ports; and (2) by giving Czecho-Slovakia complete control over all the tugs, vessels and other property of the German-Austrian Steamship Company and the New German-Bohemian Elbe Shipping Company, which are controlled by Czecho-Slovak capital, but whose tugs and vessels are registered in German ports. Germany urges that the tugs and vessels in these two categories can be regarded as already meeting the legitimate needs of Czecho-Slovakia because in one instance Czecho-Slovakia has a measure of control through the fact of registry in Czecho-Slovak ports, although the tugs and vessels are controlled by German capital, and in the other instance Czecho-Slovakia has a measure of control through the fact that the tugs and vessels, though registered in German ports, are controlled by Czecho-Slovak capital.

Thus both delegations appear to look in the first instance to the satisfaction of the legitimate needs of Czecho-Slovakia out of the tugs and vessels falling in these two categories.

The Arbitrator is of opinion that the tugs and vessels coming within these two categories cannot be regarded as fully responsive to the legitimate needs of Czecho-Slovakia unless in the one case (where the registry is already in Czecho-Slovak ports) all German ownership or interest shall be transferred to Czecho-Slovakia, and unless in the other case the registry shall be transferred from German ports to Czecho-Slovak ports, (together with the transfer of any element of ownership or interest which is not already owned by Czecho-Slovak nationals), all such steps to be evidenced by the necessary documents; to the end that in both cases the tugs and vessels, before being counted against the legitimate needs of Czecho-Slovakia, shall be both registered in Czecho-Slovakia and completely owned and controlled by Czecho-Slovakia or its nationals. It is recognized that the total of tugs, harbor tugs and freight boats in these two categories are in excess of the legitimate needs of Czecho-Slovakia for tugs, harbor tugs and freight boats and due adjustment therefor should be made.

The Arbitrator is further of opinion that to the extent that the legitimate needs of Czecho-Slovakia as determined by him shall not be satisfied out of the two categories last mentioned and in the manner indicated by the Arbi-

trator, Germany shall cede to Czecho-Slovakia tugs and vessels from among those registered in German Elbe ports, which shall be selected from among those most recently built, and all tugs and vessels so ceded shall be provided with normal and proper fittings and gear and shall be in a good state of repair and in condition to carry goods.

The tugs and vessels ceded by Germany to Czecho-Slovakia shall be accompanied by documents evidencing the transfer to Czecho-Slovakia of the entire property in such tugs and vessels free from all encumbrances, charges and liens of all kinds.

If the tugs and vessels now registered in Czecho-Slovakia and belonging to the Austrian Northwest Elbe Shipping Company are not, through the processes above pointed out by the Arbitrator, devoted to the satisfaction of the needs of Czecho-Slovakia, but remain in the control of German capital, and instead of, and as the due equivalent for, such tugs and vessels Germany shall cede other tugs and vessels to Czecho-Slovakia, the Arbitrator will entertain an application by Germany that as a condition to the completion of the cessions to be made the registry of such tugs and vessels of said last mentioned company shall be transferred from Czecho-Slovak ports to German ports.

The Arbitrator believes that in the light of the foregoing principles the two delegations will be able to reach an agreement as to the steps which are practicable and reasonable in respect of the Austrian Northwest Elbe Shipping Company's tugs and vessels which are registered in Czecho-Slovak ports and in respect of tugs and vessels of the German-Austrian Steamship Company and the New German-Bohemian Elbe Shipping Company; and, following such agreement, will be able to select, in accordance with the foregoing principles, the other units of tugs and vessels to be ceded by Germany to Czecho-Slovakia.

The Arbitrator, therefore, directs that prior to Wednesday, July 6, 1921, the Czecho-Slovak Delegation and the German Delegation shall endeavor to agree upon the steps to be taken and upon the tugs and vessels to be selected in accordance with the foregoing principles for the satisfaction of the legitimate needs of Czecho-Slovakia. At 10 o'clock on Wednesday morning, July 6, 1921, the Arbitrator will receive the reports of the Czecho-Slovak and German Delegations as to the result of their efforts to agree, will thereupon hear the two delegations as to the points upon which they are unable to agree, and will then specify the steps to be taken as to the tugs and vessels of the Austrian Northwest Elbe Shipping Company which are registered in Czecho-Slovakia, and as to the tugs and vessels of the German-Austrian Steamship Company and of the New German-Bohemian Elbe Shipping Company, and will designate the additional units of tugs and barges to be ceded, and will give the notification contemplated in the first sentence of Article 339 of the Treaty of Versailles.

MATERIAL NECESSARY FOR THE UTILIZATION OF THE RIVER

Czecho-Slovakia has asked for the cession by Germany of various buildings, fixed harbor installations and floating cranes, pontoons and other floating material, on the ground that it is entitled to the same under the provision of Article 339 that Germany shall cede material of all kinds necessary for the utilization of the river system.

Czecho-Slovakia demands various buildings and other property of the Austrian Northwest Elbe Shipping Company located or used in Germany. The Arbitrator, however, decides that Germany cannot be required to cede these buildings and other installations and property to Czecho-Slovakia simply because they are the property of a company which appears to have been largely interested in navigation to and from the ports which are now in Czecho-Slovakia.

Czecho-Slovakia also demands various buildings and other property located or used in Germany and belonging to the German-Austrian Steamship Company and the New German Bohemian Elbe Shipping Company, both of which Companies are controlled by Czecho-Slovak capital. Here likewise the Arbitrator decides that Germany cannot be required to cede such property to Czecho-Slovakia simply because it belongs to companies which are controlled by Czecho-Slovak capital.

Czecho-Slovakia also demands that Germany cede to it certain buildings and other fixed property located in Czecho-Slovakia and belonging to the Austrian Northwest Elbe Shipping Company or the German-Austrian Steamship Company or the New German-Bohemian Elbe Shipping Company. As to all of this property, except the buildings used for offices, the Arbitrator decides that Czecho-Slovakia will be able to see that it is used without discrimination for the benefit of all boats using the river, since the property is within the territorial jurisdiction of Czecho-Slovakia, and hence the Arbitrator decides that there is no necessity for requiring Germany to make any cession in respect of any of this property. A different principle may be applicable as to the buildings which are used for offices, and this branch of the matter will be referred to below.

With reference to the buildings and harbor installations in the port of Hamburg, the following articles of the Treaty of Versailles have an important bearing:

ARTICLE 363

In the ports of Hamburg and Stettin Germany shall lease to the Czecho-Slovak state, for a period of 99 years, areas which shall be placed under the general régime of free zones and shall be used for the direct transit of goods coming from or going to that state.

ARTICLE 364

The delimitation of these areas, and their equipment, their exploitation, and in general all conditions for their utilization, including the amount of the rental, shall be decided by a commission consisting of one delegate of Germany, one delegate of the Czecho-Slovak state and

one delegate of Great Britain. These conditions shall be susceptible of revision every ten years in the same manner.

Germany declares in advance that she will adhere to the decisions so taken.

The Arbitrator is of opinion that with respect to the buildings and harbor installations necessary for the traffic referred to in Article 363, the matter is to be determined in accordance with the provisions of Article 364, which are special in character and which should, therefore, prevail over the general provisions of Article 339. The Arbitrator will discuss below the question whether any of the Hamburg traffic shown in Appendix I is outside the scope of Articles 363 and 364 and if so what, if any, material is needed in respect thereof.

The foregoing principles having been established with reference to material to be ceded for the utilization of the river, it is still necessary to determine the question of fact as to what buildings, harbor installations and other property located or used in Germany should be ceded by Germany to Czecho-Slovakia under Article 339 in order to meet the latter's legitimate needs.

The Arbitrator decides that Czecho-Slovakia has a legitimate need for certain installations at Magdeburg and that this need will be met by the cession to Czecho-Slovakia of the smaller of the two warehouses belonging to the firm of Schulze & Company, with the quay and two electric cranes pertaining thereto. The Arbitrator hereby determines that Germany shall cede to Czecho-Slovakia said warehouse, quay and electric cranes. Prior to Wednesday, July 6, 1921, the Czecho-Slovak Delegation and the German Delegation shall endeavor to agree upon a precise description of such warehouse, quay and electric cranes to be ceded in accordance herewith, and shall report to the Arbitrator at 10 o'clock on Wednesday morning, July 6, 1921, and the Arbitrator, after hearing the parties, will settle the precise description of the property and interests to be ceded and will include the same in the notification contemplated in the first sentence of Article 339. The cession of said property and interests shall be accomplished by the execution of all legal documents and the doing of all acts necessary or proper in order to vest in Czecho-Slovakia the entire ownership of such property and interests free from all encumbrances, charges and liens of all kinds.

The Arbitrator decides that Czecho-Slovakia has a legitimate need for the three floating cranes of the Austrian Northwest Elbe Shipping Company which are used in Czecho-Slovakia, one at Karlin, one at Teschen, and one at Aussig. These floating cranes have no fixed location, and so long as they are controlled by German capital, there is the chance that they may be removed from the territorial jurisdiction of Czecho-Slovakia. The Arbitrator, therefore, decides that Germany shall cede these floating cranes to Czecho-Slovakia, and shall deliver proper documents evidencing the transfer to Czecho-Slovakia of the entire property in such cranes, free from all encumbrances, charges and liens of all kinds. Such cranes will be included in the notification above referred to.

The Arbitrator requests the two delegations to agree, if possible, concerning the matters involved in the following four questions, and to report to him at the meeting on Wednesday, July 6, their agreement, or their respective views to the extent that they cannot agree:

1. Is there any traffic at Hamburg, shown in Appendix I, of interest to Czecho-Slovakia and outside of the scope of Articles 363 and 364; and, if so, has Czecho-Slovakia a legitimate need for any installations at Hamburg in respect of such traffic; and, if so, what installations are needed for that purpose?

2. Has Czecho-Slovakia a need for the quay of about 435 meters in length on the right bank of the Elbe at Magdeburg between the Kœnigsbridge and Ankonastrasse, or for any part thereof, or for any equivalent property at Magdeburg?

3. Has Czecho-Slovakia a legitimate need, on the German part of the Elbe, for the two floating cranes and the twenty pontoons, or any part thereof, demanded by it out of the property of the Austrian Northwest Elbe Shipping Company?

4. Has Czecho-Slovakia a legitimate need for the cession to it of the property in the buildings owned by the Austrian Northwest Elbe Shipping Company and used for offices at Karlin, Aussig and Melnik in Czecho-Slovakia?

The Arbitrator, after receiving the report or reports of the two Delegations on Wednesday, July 6, in respect to the matters involved in the four questions last stated, will determine what, if any, material, of the character referred to in said four questions, shall be ceded by Germany to Czecho-Slovakia, and will specify the same, and the manner of effectuating the cession thereof, in the notification to be given at that time.

With the exception of the Schulze warehouse, quay and electric cranes at Magdeburg and the three floating cranes in Czecho-Slovakia, above awarded to Czecho-Slovakia, and with the exception of the property referred to in said four questions, as to which decision is reserved, the Arbitrator decides that no need has been shown for the cession by Germany to Czecho-Slovakia of material for the utilization of the river.

PLACE OF DELIVERY AND PROVISIONS FOR INSPECTION

The place of delivery of tugs and vessels and other movable material and the provisions as to inspection of tugs, vessels and other material and as to inspection of the necessary documents to be delivered therewith will be settled at or before the time of the notification which is to be given after the meeting above fixed for Wednesday, July 6, 1921.

VALUATION

At or after the hearing to be given on Wednesday, July 6, 1921, the Arbitrator will prescribe the procedure to be followed with a view to his settling in a lump sum the value of the cessions under Article 339.

POSSIBLE ADDITIONAL CESSION BY REASON OF DIMINUTION IN CESSION FOR REPARATION

If it shall be found that the total amount of barges to be ceded by Germany to the Reparation Commission out of the German Elbe fleet shall be substantially less than the 187,000 tons hereinabove mentioned, the Arbitrator will entertain an application by Czecho-Slovakia for the selection by the Arbitrator of additional units of barges within the limit of the 261,000 tons of barges (which the Arbitrator has above indicated represents in principle the total legitimate needs of Czecho-Slovakia) for the purpose of giving Czecho-Slovakia its fair proportion of all barges remaining registered in Elbe ports after the deduction of those surrendered by way of restitution or reparation.

CONCLUSION

In conclusion, the Arbitrator hereby expresses his high appreciation of the extremely helpful cooperation which has been accorded him by the two delegations, and especially for the great assistance they have rendered him through settling by agreement numerous important technical factors with which the Arbitrator had to deal.

Paris, June 14th, 1921.

By the Arbitrator:
(Signed) BRICE CLAGETT,
Executive Assistant.

(Signed) WALKER D. HINES,
Arbitrator.

ANNEX I

Agreed 1913 Elbe Traffic

DISTRICT	TONS OF TRAFFIC
Aussig-Hamburg (transit)	600,000
" (local)	200,000
Hamburg-Aussig (transit)	650,000
" (local)	50,000
Aussig Middle Elbe	1,600,000
Middle Elbe-Aussig	50,000
C. S. Local traffic downstream	255,000
C. S. Local traffic upstream	95,000
TOTAL traffic interesting Czecho-Slovakia	3,500,000
Internal German traffic	13,900,000
TOTAL Elbe traffic	17,400,000

ANNEX II

Agreed Elbe River Fleet

Owner and Registry	Number of Barges	Tonnage of Barges	Number of River Tugs	H. P. of River Tugs	Number of Harbor Tugs	H. P. of Harbor Tugs	Number of Self-Propelled Vessels	Tonnage of Self-Propelled Vessels	Miscellaneous
Registered in C. S. and controlled by C. S. Nationals	145	50,200	14	2720					
Registered in C. S. and controlled by German Nationals	114	78,900	8 (1)	1200	7	850	7	$\frac{2300}{1800}$ HP	
Registered in Germany and controlled by C. S. Nationals	85	62,950	31	20,400	9	1890	5	$\frac{1346}{1150}$ HP	20 storage boats and 24 lighters for sea service and 2 launches
Registered in Germany and controlled by German Nationals		1,103,050 (3)	168	51,040	(2)	(2)	180	$\frac{24,154}{19,350}$ HP	(4)
TOTAL		1,295,100 (3)	221	75,360			292	$\frac{27,800}{22,300}$ HP	

(1) Includes one paddle wheel tug and 7 chain tugs. The chain for the tugs is controlled by German Nationals also.
(2) Not stated but included in self-propelled vessels.
(3) Excludes 80,000 tons broken up from 1918 to 1920.
(4) Not shown.

BOOK REVIEWS AND NOTES*

International Society: Its Nature and Interests. By Philip Marshall Brown. New York: The Macmillan Co., 1923. pp. xiv, 173. $1.50.

The vision of a new world order which came to many as a result of the late war has been followed by much disillusionment. There has been the inevitable search for the causes of failure, much of it directed to discussion of existing and proposed instrumentalities for world organization. By way of contrast, this book is devoted to a study of foundations rather than of superstructure; of the materials of international society, rather than the construction of a system.

At the basis of international society is man himself, viewed however as part of the state. The author analyzes this relationship, the tendency toward nationalism to which it gives rise and its effect upon international stability. National communities, though entities, cannot be regarded the subjects of coercive law, like individuals. The law of nations is therefore not comparable to municipal law, though to the adherents of the Austinian theory he points out that international law is nevertheless true law, having for its sanction the enlightened self-interest of nations. He excludes the laws of war because these are abnormal in character and are supposed to regulate conduct under conditions which are an absolute denial of law (p. 31).

The author emphasizes the incompleteness of international law. There are no means of establishing moral rights as distinguished from vested legal rights, though "the peace of international society demands the highest degree of freedom of international intercourse" (p. 45). From this premise, he ventures into new ground, suggesting a pooling of economic interests in peace times similar to the methods employed by the Allies during the war. His reasoning is forward-looking and upon a high plain; but the difficulties of achievement are not to be underestimated. So far as territorial adjustments are concerned, the author realizes that "to suggest any alterations of the European *status quo* in times of peace is to endanger peace" (p. 41). Yet one would be inclined to the view that if the nations should ever progress to the point of sharing *economic* advantages, territorial adjustments in the interest of stability would also not be unthinkable.

The details of the settlement of the recent war are not discussed owing to the limitations which the author has set. He recognizes many elements fraught with danger and as these have been deliberately tied up with the League through the peace treaties, he believes that "the League has been unfairly handicapped at the start" (p. 129). The method and purposes of the League receive his general support as a European concern but his prefer-

*The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes.

ences seem to be against active participation on the part of the United States (p. 130).

The author has by no means omitted discussion of machinery and institutions in his survey of the bases of international society. Besides the League of Nations, he reviews the several functions of the Court of Arbitration and the Court of Justice in a chapter entitled "International Disputes." The competence assigned to the new court would be narrower than proposed by the solution of the Institute of International Law in 1922 (p. 88). The author also prefers that disputes arising from the interpretation of the recent peace treaties should go to the Hague Court of Arbitration rather than to the new Court of Justice, because he fears that it would deflect it from its true task of "the judicial decision of justiciable disputes on a strictly legal basis" (p. 85).

In the final two chapters, the author reviews the new alignment of international political forces since the war and the "imponderables" of race, religion, inherited prejudices and crowd psychology. Here his ripe experience in diplomacy has given him insight into forces often neglected by those having purely academic viewpoints. Above all he sees that the spread of democracy is by no means an element necessarily making for peace. One is reminded of the wise words of Sancho Panza in a recent romantic play. When suddenly elevated to the governorship of Barataria, false counsellors seek to embroil him in war. When asked whether he does not fear the enemy, he replies: "I fear my people more, though I love them too." Perhaps this is just another way of saying, as the author does, that democracy is "an imponderable factor in the relations of peoples that awakens mingled feelings of hope and apprehension" (p. 160).

The discussions, necessarily contracted, are always fresh and interesting. Professor Brown has an admirable quality of reaching out for the vital issues. The book is enlightening and performs the best service of all, stimulation of activity in the mind of the reader.

ARTHUR K. KUHN.

The World Crisis, 1915. By Winston S. Churchill. New York: Charles Scribners' Sons, 1923, Vol. II., pp. xii, 578, index. $6.50.

This second volume of W. S. Churchill is even more interesting than his first one that covered the preceding years 1911–1914, on the opening period of the war. It is important and interesting from several different points of view: first, because it gives some hitherto unknown, but extremely valuable details, concerning the history of the World War; secondly, on account of the light it throws on the developments of English party-politics and the inside workings of the British Cabinet system; and thirdly, because it candidly discloses Churchill's own doings. In this latter respect, if we remember the storm that broke loose over his head and the many accusations that were

levelled at him, one must say that this narrative exculpates him entirely. It is written in a simple and perfectly sincere way, without the slightest effort to dodge responsibility or avoid ticklish questions. The only thing that remains against him is his impetuosity, his lack of patience and adventuresome spirit. We admit the dangers that such a nervous state of mind can create during a national war; but on the other hand, the great war probably would not have been won without such risk and enterprise. One matter is clear: Churchill explains to perfect satisfaction that the tragedy of the Dardanelles expedition was not due to his fault; least of all are justified such accusations, as for example those of the official Australian Historian of the World's War.

From the first pages of his book, the author gives us a striking picture of the gropings of the Allies for vulnerable points in the German front. Already very early in the war (in the autumn of 1914) did far-sighted statesmen realize that Germany could not be beaten on the Western front; all the Allies could do there was to hold it, and to avoid a break; at the same time, Churchill, Admiral Fisher and some others felt that the great naval superiority of their country was running somewhat idle or wasted. Thus began the "Search for a Naval offensive" (Ch. II), which soon and naturally turned the attention of these men on Turkey; just there existed a most vulnerable point in Germany's armor, and, at the same time, also just there could be found a chance of helping Russia when she began to give out. The Baltic and North Sea coast seemed a most difficult problem for any attack-scheme, though some statesmen, like Admiral Fisher, were not averse from trying it nevertheless. Gradually, however, it became evident that such plans were quite impracticable and consequently attention was centered on the Dardanelles. Incidentally we have here a wonderfully true appreciation of the personality and work of Lord Kitchener, who was at first very much opposed to any southern expedition and did all he could to thwart Churchill's plans; only later did he become luke-warm to it and finally began to press the matter, when it was too late for immediate success.

We find in this volume too a most interesting history of the "Origin of Tanks and Smoke" (Ch. IV), and some beautifully written accounts of the few naval battles that took place in 1915 (Ch. VI), giving us a vivid picture of the work of the British Navy. Being himself full of energy and initiative, Churchill naturally often comes back to the personal appreciation of men in his surroundings, admirals and statesmen, invariably separating them into two incompatible groups, the energetic and active ones, like Beatty or Wilson, and the passive ones, like Jellicoe or deRobeck, who invariably lost their chance of attack and victory, but did preserve the English fleet.

The exploits of the British submarines in the Sea of Marmora, so little known to the outside world and yet so daring and useful, are told in this book with the usual picturesqueness. But the concluding chapters on the Dardanelles battles make really a "Darkening Scene" (Ch. XX), showing us

clearly the "Ruin of the Balkans" (Ch. XXII). The appreciation of the political and military defeat of the Dardanelles and the placing of responsibilities for this terrible tragedy have indeed to be revised, now that we know so much more of the inside history of that discouraging period of the World War.

S. A. KORFF.

Enemy Property in America. By Arthur Garfield Hays. Albany: Bender & Co., 1923. pp. xii, 396. $12.50.

This book contains a preface of five pages, sixty-six pages of text, 103 pages of reported and unreported cases under the Trading with the Enemy Act decided prior to February 1, 1923, and seventy-four pages containing our treaty of peace with Germany and our treaty of peace with Austria, and portions of the Versailles treaty relating to enemy property. The appendix contains the Winslow Bill, with a note on that bill and a discussion of the future disposition of the balance of alien property.

The book is a useful compilation to any one concerned with questions relating to enemy property. The text, however, constitutes less of a treatise on the subject than of a brief devoted to the practical end of freeing German property seized by the Alien Property Custodian from any liability for the wrongs committed by the German Government upon American citizens. Even considered as a brief on behalf of German clients, the author's argument is often weakened by the necessities of his case.

The book begins with the following statements: "For perhaps two hundred years, private property on land had been regarded as immune from seizure and confiscation." "The seizure of enemy property during the great war was a new departure."

For neither of these statements does there appear to be any foundation in fact, nor is the brief strengthened by the citation of Chief Justice Marshall, on page 63, as supporting the author's claims. The author quotes an extract from Marshall's opinion in U. S. *v.* Percheman, 7 Peters, 51, 86, and, like some other writers who have used the same quotation, ignores the fact that the confiscation which Marshall condemned was the confiscation of the property of individuals in territory acquired by cession or conquest from another sovereign. Between such confiscation and the confiscation of enemy private property in war, Marshall drew a clear distinction, which the author has either ignored or failed to grasp. With reference to the confiscation of enemy property in war, Marshall says, in Brown *v.* U. S., 8 Cranch. *110, 122, "that war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded."

The existence of a rule of international law is one thing; the desirability of a change in that rule is another thing, as Chief Justice Marshall pointed out with reference to the slave trade, in *The Antelope*, 10 Wheaton, 66.

One of the commonest failures of writers and teachers of international law is to ignore this distinction, and to assert that any rule which the particular writer or teacher believes to be based on sound policy is a rule of international law. The question of law as to the right to confiscate enemy private property is settled by the American authorities against the contention of the author. The authorities are reviewed in the *Boston University Law Review*, Vol. 3, page 156.

The question of policy as to the confiscation of enemy property, like all other questions of policy, must depend upon the circumstances of the particular case. In an ordinary war, such as the war between the United States and Spain, or the Boer war with England, there are reasons of policy for the exemption of private property from confiscation, as is shown by various treaties providing for such exemption. An obvious distinction, however, exists between an ordinary war, fought to settle a particular dispute, and a war *à l'outrance*, fought for the preservation or destruction of national existence. In a war of the former kind, certain rules of comity may be observed. In a war of the latter kind, the law of self-preservation merges all other so-called rules of war. The denial of this rule by jurists has never sufficed to prevent its application by contending belligerents.

As a matter of law, the recognition of the corporate entity of the state does not release its citizens from the obligations of that state. The state is a corporation of which all its citizens are members, but the liability of the members of the corporation is unlimited. The state may be treated as the primary debtor, but whether the liability of its citizens should be enforced indirectly through taxation by the debtor state, or directly by seizure by the creditor state, is a question of procedure and not of liability. Those who deny the right of confiscation attempt to make the right of private property an absolute and abstract right, whereas such right is relative and conditional. The individual rights of life, liberty and property, have no absolute or abstract existence; they are rights which, from a legal standpoint, exist solely because of their protection by the state, and which are, therefore, subject to the needs of the state without limit.

An attempt was made by the Second Hague Conference to limit the rights of belligerents in numerous ways. The conventions agreed upon were not operative during the World War for the technical reason that the belligerents were not all signers of the conventions. There seems to be no reason to suppose, however, that this technical ground was the sole reason that the conventions did not operate. When one nation begins war by treating one treaty as a scrap of paper, the practical importance of treaties becomes seriously diminished. The object of the Hague Conventions was to render war humane, and to limit the damage done as far as possible. It is probable, however, that there never was a war which inflicted so much suffering on noncombatants, as the World War. Under modern conditions, the military power of a nation is affected, not merely by the condition of its combatant

forces, but by the industry and self-denial of every noncombatant above the age of infancy. In the World War, both sides relied upon pressure upon noncombatants as a measure of military importance. The humane theory of excepting noncombatants from the consequences of warfare is so diametrically opposed to the military importance of weakening the power of those noncombatants to support the forces in the field, that there are bound to be two classes of thought in regard to conventions like those of the Hague. Humanitarians and jurists will seek to relieve the pressure on noncombatants, while soldiers, and sometimes statesmen, will seek to increase it. The former will be successful in time of peace in limiting the horrors of war by agreement. Military men in all countries, however, have always been sceptical as to the power of men of the gown to improve on General Sherman's definition of war,—a scepticism in no way diminished by anything that has happened since 1914. The military point of view is illustrated by the following paragraph from the *Wall Street Journal* of October 16, 1923:

> Lieut.-Commander Burney of British navy, M. P. and inventor of anti-mine "paravane," says in Herald the next war will be marked by three main factors: Increased war area due to range of flying machines, power of offense outstripping defense, and no such persons as noncombatants. Objectives in fighting will be destruction of cities, railways, power stations, factories, any concentrated structures bearing on life of nation and its fighting power.

The future protection of the property of alien enemies from confiscation, therefore, would seem to be at least as uncertain as the protection of the lives of their noncombatants.

EDWARD A. HARRIMAN.

The Principles of International Law. By T. J. Lawrence. Revised by Percy H. Winfield. Boston, New York and Chicago: D. C. Heath & Co., 1923, pp. 766.

That a work on international law written by a clergyman "Rector of Upton Lovel, Wiltshire," whose chosen amusement was gardening and who held for years a rural parish, should have become almost a classic in the twenty-eight years since it first appeared and should reach its seventh edition, is worthy of note.

However, Dr. Lawrence was more than the "rector of a parish." He was a Whewell University scholar and was senior in two Triposes which never happened to any other man at Cambridge, and deputy professor of international law at that great seat of learning when Sir William Vernon Harcourt held the professorship. Coming to the United States in 1892, he filled the post of professor of international law at the University of Chicago for two years. He held the place of reader in international law at Bristol University and of lecturer on international law at the Royal Naval

War College, and the present is one of no less than seven important works, bearing his name, on the same great branch of law, at least one of which had the unique honor of being carried by every American, British and Japanese warship.

When the author brought out the fourth edition in 1910, it was, as he said "practically a new work retaining the old title and the original divisions of the subject."

That edition contained 745 pages and the number was the same in the fifth and sixth editions. They were in fact not new editions, but substantially mere reprints.

Dr. Lawrence's lamented death having occurred on August 16, 1919 the present editor undertook the necessary revision for the seventh edition made imperative by the international events of the past eight years. He has, by rigorous excisions and condensations and by stating the new matter most concisely, expanded the work by but twenty-one pages, so that it now numbers but 766 pages in all. In the sixth edition of 1915 Dr. Lawrence decided to make a few alterations in the text to secure greater accuracy rather "than to attempt any notice of the great changes and controversies that have been thrust on the attention of civilized mankind in the present World War". He anticipated great modifications of existing problems before the close and said "the only thing absolutely certain is that we shall look out upon a different world. It will be time to describe the new order and criticize the events that led up to it, when it emerges from the horror and destruction of the present conflict".

Dr. Winfield, on undertaking the present edition, felt constrained to extend his revision back to 1910, the date of the fourth edition, for the reasons indicated above, and found his task by no means light. Regarding it as imperative that the book should not "outgrow the span which a student may reasonably expect" he abridged Dr. Lawrence's text where he could and added statements as to new matter in as compact a form as was possible, indicating new matter by square brackets.

The references had practically not been verified since the first edition and this verification, though difficult, he has accomplished. Dr. Pearce Higgins, the eminent Whewell professor of international law at Cambridge, in which he is the successor to the two learned and honored names of Westlake and Oppenheim, read the new matter and made invaluable suggestions as to it so that it has the weight of his approval.

Dr. Lawrence had, as was natural, accented the moral rather than the legalistic side of his vast subject and had always been enthusiastic "in the cause of international peace". Who is not? The difference is not as to results, but as to methods which will give the best assurance of those results desired by all. Both Dr. Lawrence and his editor are warm supporters of the League of Nations, and both are insistent that the United States should join not in the concert of Europe, but in the concert of the world. It is

pointed out that she has already so intervened as to the open door in China, in the Morocco conference of 1906, and at the peace conference at Versailles. "A vast and powerful state cannot live alone, simply because it is not alone", says Dr. Lawrence. The same may be said of an American heiress beseiged by European suitors, yet her surrender to their suit has not often been for her good and has often proved her lasting misfortune. We cannot read the future. That is reserved for the wisdom of palmists and fortune-tellers, who wear oriental costumes and accept a small fee. Dr. Lawrence as late as 1910 in his fourth edition, however, discovered "a new spirit abroad", and recorded the great progress of the past few years and was ardently assured that "the two Hague conferences have given an enormous impulse to the forces that make for peace".

"So thought we all of us, so thought we all", but we have been taught by the events that neither he nor we were among the prophets. The remedy so hopefully accepted was what Richard Grant White called "court plaster for a cancer".

Now, like the Irish lawyer whose points were overruled, and who declared "I will now submit your honor", six others "aaqually as conclusive", they demand that we accept kindred scholastic schemes for composing international disputes. We are again assured (as by the quack in the French play), that "*these pills* are good against the earthquake" and we are told to lay aside all other remedies and precautions and to trust to these alone.

Dr. Lawrence has, however, very lucidly and adequately traced the history, development and stated very justly the present state of international law. His book was "written in English, and intended in the main for British and American readers", and he says "that of set purpose he has taken most of the cases" from British and American History. Having taught on both sides of the Atlantic he has noticed "that the influence of old controversies and misunderstandings has not entirely passed away". He seeks to discuss them in a spirit of impartial justice and if he ever favors his own country "the error is that of one who", as he says very pleasantly, "were he not an Englishman, would ask no better fate than to be an American".

He says he was "helped at every turn by the robust and incisive arguments of Mr. R. H. Dana, and the judicial reasoning and encyclopedic knowledge of Mr. W. E. Hall".

Dr. Winfield's additions cover a great number of points which arose in what he constantly cites as "the great war", and from the treaties and covenants consummated at its close, and the vast complications that have ensued and are now threatening the peace of the world. Thus the League of Nations (pp. 77 and 571); mandates (p. 80), jurisdiction over the air (p. 143); Permanent Court of International Justice (p. 576, where it is difficult to separate the author's and editor's text); blockade during the

great war (p. 698); continuous voyage (p. 728); contraband (p. 734); and a thousand other matters as affected by late practice and decisions are discussed. References are made constantly to our principal mine of international precedents, Moore's *Digest* and to the seventeen volumes of this JOURNAL. The convenient practice of referring for public documents to the SUPPLEMENTS to the JOURNAL is also largely followed. The present edition gives us as clear, useful and modern a handbook of the subject as can be hoped for. The style is somewhat ornate and expansive, perhaps from the influence of the pulpit, the platform of the political speaker and the law lecturer. In all these Dr. Lawrence was known for ready flowing interesting and forceful speech. At his death the London *Times* said his style was formed confessedly on long study of Macaulay.

But there is broad knowledge, admirable arrangement, definite information, a just and humane spirit, and the story moves along embellished with many a picturesque fact so that the student reads *con amore* and seldom falls asleep.

CHARLES NOBLE GREGORY.

Public Opinion in War and in Peace. By Abbott Lawrence Lowell, President of Harvard University. Cambridge: Harvard University Press. London: Humphrey Milford, Oxford University Press. 1923. pp. xi, 302. $2.50.

This book is a new and important study of the nature and limitations of opinion, the processes of its formation and the modes of giving expression to it, especially in developing and directing the policies of government. As President Lowell points out, there is unavoidable repetition in some places of views expressed in his earlier writings, particularly in *Public Opinion and Popular Government*, but the repetition is not extensive and the present work is a fresh and suggestive examination of this important subject.

The study was suggested by the political attitude of thoughtful people which President Lowell observed during a visit to England during the summer of 1920. There seemed to be an atrophy of public opinion. There was criticism, but it was negative rather than constructive, and it was unable to rally any considerable body of thought about a positive program. A natural curiosity was aroused, says the author, to inquire into the reasons for such a condition, and its bearing upon the peculiar, but various, states of mind prevailing in other countries that had taken part in the great struggle. "Public opinion everywhere after the war flowed in unaccustomed channels: and, since light is often shed upon normal conditions by a study of the abnormal, it seemed that something might be learned about the nature of public opinion in ordinary times by observing its operation under the severe strains that accompany and follow a great war."

In the chapters expressing the results of the study thus suggested, the

formation of personal opinion is first considered, with an inquiry into the reasons why rational people reach different opinions with a sense in their minds, not of doubt, but of conviction. Then follows a discussion of the nature and growth of collective opinion, the influence of leaders, the benefits and dangers of the group spirit. While President Lowell gives full recognition to the value of groups, and considers the group spirit not only unavoidable but absolutely essential for all civilization, from the barbarous tribe to highly organized communities, he is not one of those who regard it as almost if not quite wholly beneficial. It involves, along with its benefits, grave dangers. Loyalty to a group of which one is a member may be ennobling, but it may also be narrowing by diminishing a sense of obligation to those outside the group. A man who seeks to promote his own personal advantage is aware that his efforts are selfish, but if he is striving not for himself but for the benefit of a group of which he is a member, his motive appears unselfish, altruistic, philanthropic. It is none the less selfish, however, and the only difference is that the selfishness is that of a group and not that of a single person. With the increase of group action, in politics, in industry and elsewhere, the public has probably less to fear in the immediate future from personal than from coöperative selfishness.

Public opinion may be formed either by the gradual growth of ideas that in the course of time come to control thought and action, or by the consideration of controversial questions that require immediate decision. Opinions arrived at by the first of these processes are often more active and more effective than those reached in direct political controversy, but when the second method is necessary a choice between two alternatives is more likely to produce a genuine public opinion than a choice among a larger number. In electing one or the other of two candidates, or in supporting or opposing a certain policy, public opinion chooses between two alternatives.

In war, especially in such a war as demands the whole energy of all classes of men and women in war work, there is an immediate effect on the attitude of mind of everyone who is brought into connection with it. The motives of ordinary life are superseded. The sacredness of life loses its relative importance, individual liberty is in some degree subordinated to the main purpose of the time, and difference of opinion about the rightfulness or wisdom of the war appears treasonable. No alternative is permitted, intolerance and excess are in such a war a natural result of the absence of a loyal alternative to its prosecution with the utmost vigor.

After the war abnormal conditions continue. In England, for example, there was at the time of the armistice no organized party of opposition. The ordinary machinery for formulating the questions on which opinion is based had disappeared. Autocratic government continued, as it must always do when there is no concrete alternative. In England and elsewhere there have been also other manifestations of abnormal conditions: a tendency to violent methods, a materialistic reaction, a relaxing of motive that

permits moral lassitude. But the change that has taken place was predictable and the disappointing states of mind that have followed the war are the temporary results of a sudden revulsion of feeling and need not be of long duration.

H. W. TEMPLE.

The Partition and Colonization of Africa. By Sir Charles Lucas, K.C.B., K.C.M.G. New York: Oxford University Press, American Branch. 1922. pp. 228. $4.20.

This volume contains eleven lectures on problems of world politics which the author delivered in 1921 at the Royal Colonial Institute to a study circle of teachers of the London County Council, and which are "designedly somewhat discursive with the intention of suggesting diverse points of view and a variety of subjects for further study on the most dependent of all the continents." Two lectures are devoted to a historical survey of the coasts of Africa from the earliest times to the nineteenth century; one to the slave trade; one to missionaries and explorers of the interior to 1877; two to the main features of the scramble for Africa from 1884 to 1891 and from 1891 to 1914; three to a study of the European intrusions in North Africa, in South Africa and in West and East Africa; one to the African campaigns of the World War; and one on the result of the war on the map and problems of Africa. Although in scope and detail the volume is not as comprehensive as the larger volume of Norman Dwight Harris on *Intervention and Colonization in Africa* which was published in 1914, it sketches the chief colonial movements of European Powers seeking territory and economic concessions in Africa, and is especially valuable for its brevity of treatment and for its breadth of view in discussing the problems of expansion and administration.

Following the lectures are several brief appendices, including a brief note on books. The volume has a good index and a map of Africa for the year 1914.

In explaining the scramble for Africa after the seventies, the author states that the immediate prelude was not only the discoveries which gave something to scramble for, but also the Franco-German War which unified Germany and drove France to seek new territory to recoup her for the loss of Alsace-Lorraine. British intervention in Egypt, together with the resulting resentment of France, was a kind of prelude to the first scramble for Africa.

In 1884, Germany suddenly assumed a conspicuous place in the African sun and, following the French opposition to the Anglo-Portuguese treaty of 1884, promptly played a leading rôle in calling the Berlin Conference to consider the destinies of Africa. In the partition of territory by various treaties and agreements which resulted from the scramble to 1891—a partition which was in no small degree at the expense of Great Britain—Germany perhaps had the greatest voice, aided by France and Portugal. In connec-

tion with this first stage of the scramble the term "spheres of influence", representing a very rudimentary form of protectorate, was used to designate the preparatory stage of intrusion. In the period from 1891 to 1904, characterized by consolidation of claims and definition of boundaries, and by wars in Africa, the different Powers barred one another's progress and especially collided at a point of converging interests in Lake Chad. French bitterness, which culminated at Fashoda in 1898, was terminated by the Anglo-French convention of 1904 which marked French gains in actual territory. The last stage in the scramble was marked by German attempts to intervene in Morocco, resulting in strained relations between Germany and France. Germany, who had promoted the Berlin Conference in 1884 as a sort of counterblast to the still-born Anglo-Portuguese Congo Treaty, also promoted the Algeciras Conference as a retort to the Anglo-French treaty of 1904—but with less success. Although in 1911 Germany and France eventually settled their African differences by three agreements, by which Germany for concessions to France in Morocco received a great slice of the French Congo with three protruding tongues of much political importance, the clash of interests in Africa, and the feeling engendered thereby, were among the determining causes of the war of 1914. In summing up the main features of the partition to 1914, the author states that at the end "Germany held, perhaps, the most strategic position of all the Powers" —in fact, the ground plan for a Central African empire.

In the three lectures on regional conditions and problems, the author justifies European intrusion—especially British intrusion. European intrusion, either by settlement or by exploitation, although justification can only be found in the human instinct, seems inseparable from human progress and constitutes the larger part of modern history. In orientalized North Africa it is justified both historically and geographically, and especially by provocative conditions. The course which it has followed in effete orientalized Africa is illustrated in Egypt (which had arisen from previous alien intrusion) where financial indebtedness led to European financial control. Here the writer thinks that the general amelioration of native conditions after British occupation "might be held to justify European intervention".

In South Africa, European intrusion, which began at the point most remote from Europe and in a sphere of virgin barbarism, is explained first by the early call of the farther East and also by climate, and is justified on the ground that there was room for whites as well as blacks. In justification of British interference with the first white intruders in South Africa, and for taking the government from the Dutch, the author says, "But weak governments have in history been most injurious to the interests of the governed and only so far as the British Government was weak and vacillating in South Africa—vacillating to a pitiable degree—did it fail to justify the supplanting of the very weak regime of the Dutch."

In West Africa, whose exploitation began with the slave trade, resulting

in antagonism of the black man against the white, the scramble of nations after the seventies, establishing limits and substituting some kind of order for chaos or for barbarism, was beneficial except in the Congo state. Here Great Britain several times (as in 1904) made cessions to France as a set-off to some gain elsewhere, and all four of her dependencies are isolated from each other and almost encircled by the French, but she holds the most valuable centers of trade and has been markedly successful in administration.

In East Africa the British possessions, which date from the period of the scramble for Africa and which since the elimination of Germany have a continuity such as the French have on the west side of the continent, really had their origin in British hostility to the slave trade.

In contrasting French and British methods of handling overseas colonies, Sir Charles says the French are more inclined to centralization and uniformity, while the British favor local legislatures and are content with endless diversities. Native races have probably more day to day practical freedom than under any other overlordship. He asserts that the British government has been fortunate in having had to deal almost entirely with distant provinces.

In the World War, the Allies properly refused to consent to the German overtures for a truce in Africa, which would have left to Germany valuable sea bases and powerful wireless stations such as the high power station at Kamina in Togoland which had been opened only three days before the war began. The failure of strenuous German efforts to arouse Africa against the Allies and the active cooperation of the natives in favor of the Allies is fairly conclusive proof that the natives preferred Allied control to German rule. The elimination of Germany from Africa, as well as the total elimination of all Turkish claims and interests, was the natural and logical result. The removal of the Power which very specially precipitated and influenced the scramble in Africa has greatly strengthened the position of other Powers —preëminently France and Great Britain. Great Britain, which before the war encircled no other European dependency of Africa, now (through her mandate for German East Africa) encircles Portuguese East Africa and has a continuity of territory from the Cape to Egypt.

Although the author recognizes advantages in the increased chances of removing causes of friction by an adjustment of boundaries concentrating spheres of different Powers to prevent intrusion of each into others, he emphasizes the necessity of a plurality of nations and of mutual checks (such as result from interlacing spheres) as adequate safeguards against abuse of power made increasingly possible by consolidation. He suggests that the League of Nations, with the accompanying mandate system (based on a larger recognition of the principle of trusteeship) should prove valuable as another strong safeguard against this danger.

Sir Charles thinks that in the solution or non-solution of African problems, the natives will have a constantly growing voice. Although they will no

doubt follow the guidance of the white men whom they know and trust, they feel the racial equalizing tendencies of the recent period of war and will continue to become more cautious and sophisticated by a knowledge of good and evil. In North Africa, where the races have in a sense agreed to live side by side, not fusing and in the main not competing, the problem is far easier. In South Africa, where the number of educated natives is yearly increasing, and where white labor would like to confine native labor to unskilled work, the difficulty of the problem is increasing.

J. M. CALLAHAN.

Un livre noir. Diplomatie d'avant-guerre d'après les documents des archives russes. Novembre 1910–juillet 1914. Préface par René Marchand. Paris: Librairie du Travail. 1922–23. 2 vols. pp. vi, 372, vi, 591. 30 francs.

This book, containing documents of undoubted authenticity, is a publication of archives to provide a particular argument, not necessarily to add to historical knowledge. The title is supposed to be sardonically reminiscent, "amply justified," according to the publisher's notice, "by the character of the contents, in which is revealed that sinister diplomacy which, under cover of a mendacious democracy, in reality decides the fate of enslaved peoples." Certainly, the serious student is sufficiently warned of the editorial bias.

The documents themselves were uncovered in the files by the Soviet authorities. M. Marchand has competently turned the ciphered dispatches into "clear," but it is difficult to convince oneself that it was all worth doing as it stands. In two volumes are nearly one thousand dispatches, arranged in chronological order on every subject that the Russian Embassy in Paris handled in four years, but with a large number of important dispatches lacking. Throughout two volumes, however, all references to the influence of the press or financial interests on diplomacy are printed in full capitals. Perhaps a dozen of the whole number are documents of definitive value. Among these may be mentioned the texts of the Russo-Italian agreement of Racconigi of October 24, 1909 (I, 357), the Franco-Russian naval convention of July 16, 1912 (I, 299), the protocols of the Franco-Russian military conferences of 1911, 1912, and 1913 (II, 419), the conditions of the Russian loan of 1914, the Straits negotiation of 1908–11, and various formal notes or *aides mémoires* on sundry subjects.

On the other hand, the whole content is new, with the exception of the dispatches of 1914 preceding the declaration of war, and these are given in full, very significantly supplementing the Orange Book edition. The discrepancy between the Orange Book and the complete documents, of which much is made, certainly warrants the careful attention of students.

The book begins with three able reports by Nekludov on French policy, There follow chronologically 600 pages of Isvolsky and 275 of Benkendorv.

Sazonov, Kokovtsev and others. Most of all this is the daily telegraph reports of embassy and the private series of letters of the ambassadors to the St. Petersburg ministry or vice versa.

The bias of the translator, "to divulge the absolutely whole truth" to deceived peoples, results in the publication of much that a purely scientific editor would have suppressed as of no value. The advantage of printing whole dossiers is, however, that we have here, perhaps better than elsewhere, an intimate view of day-to-day diplomacy, of a governmental mind in the making.

The value of these volumes will not be eventually found in the editor's capitalized emphases. It will be found in the fact that the dispatches are a storehouse of detail for the historian.

As a matter of personal evaluation, Isvolsky's judgments, suggestions and method do not impress the reader as equal to those of his subordinate, Sevastopoulo, who was *chargé d'affaires* at various times. Of the other Russian statesmen whose documents are included, Benkendorv, the Ambassador at London, and Kokovtsev, one time Finance Minister, exhibit a mental keenness which is refreshing in a great mass of banal diplomatic correspondence.

DENYS P. MYERS.

The Far Eastern Republic of Siberia. By Henry Kittredge Norton. New York: Henry Holt and Co. 1923. pp. 316.

The center of interest in the history of the Far Eastern Republic lies in the question of the relationship between it and the Moscow Soviet. New evidence on this point may be read in incidents that have occurred since the book under review went to press, culminating in the dissolution of the state and the re-inclusion of its territory within the Russian Federation of Soviets. Mr. Norton regards the creation of the buffer state, not as inspired by Moscow, but as authorized by Lenin only after the arguments of Krasnoschekov had convinced him of its practicability. He does not suggest what may have been the working arrangements between the Central Soviet and the Chita administration, though he gives attention to the mutual interests always recognized in their relations with other states. He accepts, apparently, the independence of the Far Eastern Republic, emphasizing the large peasant majority in the Constituent Assembly. His readers are left unprepared, therefore, for the *dénouement* that came so quickly as to antedate the publication of his interesting and valuable book.

Mr. Norton, who has written also over the pseudonym Orrin Keith, is a student of Oriental politics at first hand. He became personally acquainted with men and conditions in Siberia and reveals a thorough grasp of the many movements and tendencies which he presents in easy style and logical arrangement. His sympathies are with the people of Siberia who had, he

believes, already reached a sound basis of order before intervention began and who were forced by the intervention to endure years of privation, bloodshed, ignominy and retardation of economic development. Responsibility for it he places upon the shoulders of the Japanese military group, though he recognizes the interests of the United States and the other Powers concerned in trying to bring Russia back into the war. He arraigns the Japanese Government for occupying northern Manchuria and many points in Siberia with ten times the number of troops agreed upon, and the Japanese forces for wanton cruelty and incitement to disorder. He asserts that only a few days prior to the armistice on the western front the militarists in Japan, resenting opposition to their Siberian tactics, were urgent for a break with the United States but were restrained by the business group. The Cossack ataman, Semenov, whom the Japanese consistently supported, the author places outside the pale of human society.

Several chapters deal with the political, economic and social arrangements of the Republic, and a concluding one suggests its principal interests in foreign relations. These chapters are somewhat unsatisfactory, providing little information as to the actual operation of the government and very scanty statistical data as to the resources of the region. A valuable chapter discusses intimately the leaders of the new state. Among them Alexander Michaelovitch Krasnoschekov, Jew, communist, refugee in America where he graduated from house-painting to law, president of the Far Eastern Republic, recently reported to have committed suicide in a Vladivostok jail, stands out as Lenin's under-study on a smaller stage. The book is entirely lacking in references to sources, and though its general tone is not unconvincing, it reproduces with too little criticism the pamphlet publications of the short-lived state. It is supplied with a map and a number of appendices, among them the constitution. This is a book for the general reader, its interest enlivened by the high romance of its subject. Too close to the events it narrates for true historical perspective and accuracy it will, nevertheless, also have its value for the future investigator as the record, very largely, of the writer's personal observations.

HAROLD SCOTT QUIGLEY.

Histoire des Grands Principes du Droit des Gens, depuis l'Antiquité jusqu'à la Veille de la Grande Guerre. By Robert Redslob. Paris: Rousseau & Co., 1923. pp. 600. 30 francs.

Professor Redslob has attempted the difficult task of giving us what proves to be at once a history of international law in the past and a text-book of international law in the present. The combination is effected by selecting four leading principles of international law and tracing their development through successive periods of history. As the modern periods are approached, the four principles embrace an ever-widening circle of

subordinate principles and derived rules, until by the time the last period is reached most of the more important topics of international law have received treatment.

The four leading principles selected are (1) the binding force of treaties; (2) the freedom or independence of the state; (3) the equality of states; and (4) the solidarity or interdependence of states. These principles are analyzed in an introductory chapter. The first is shown to be a necessity of social life; the second a primary condition of the development of the state; the third a logical inference from the second, and the fourth the natural law of humanity, the energizing element of international law.

The survey of the recognition by nations of these principles begins with the Ancient World and continues through the Middle Ages, the period of dynastic wars (1648–1789), the French Revolution and the Napoleonic era, the treaties of 1814 and 1815, the Restoration, the Crimean War to the Congress of Berlin, and thence down to the eve of the World War, with some closing remarks upon the catastrophe of the war and the renaissance of international justice.

The historical features of the work are valuable, although they fall far short of supplying an adequate history of international law. The citations from contemporary writers will prove useful to the student, and will enable him to compare and contrast the views of the publicists of one period with those of another. In fact the volume gives a more satisfactory survey of the leading principles than more exhaustive studies could succeed in doing.

Less satisfactory, however, is the treatment of the subordinate principles and rules derived from the four leading principles. The attempt to group the wide range of modern international law under the headings selected results in illogical classifications which not only confuse the science of international law as a whole but obscure the particular topic treated. It is entirely misleading to discuss arbitration, war, and neutrality under the title of "Sovereignty", or to discuss interoceanic canals and rivers under the title of "Equality". Useful as the volume should prove in all but its closing chapter, it emphasizes the need for further efforts to develop a more analytical science of international law.

C. G. FENWICK.

Hispanic-American Relations with the United States. By William Spence Robertson. Carnegie Endowment for International Peace. New York and London: Oxford University Press, 1923. pp. xii, 470. $4.00.

The editor's preface to this very acceptable volume contains the following pertinent comment: "It is astonishing how few of our people are aware that in the countries to the south of us are great literatures, long established civilizations, and cultures of great peoples, which in some respects may

fairly be said to be superior to our own". This is but one of several books which Dr. Robertson has created to supply this deficiency in our education.

This book is the result of ripe historical scholarship, of a lifelong interest in and familiarity with the field of Latin American history, and of extended travel in the countries to which it relates. A careful reading with attention to the footnote citations reveals the author's wide acquaintance with the literature of his subject, including collections of pertinent manuscripts, though a few books, for example, Lockey's *Pan-Americanism*, Latane's *United States and Latin America*, Stuart's *Latin America and the United States*, Akers' *South America*, Dawson's *South American Republics*, Shepherd's *Latin America*, Fortier and Fickelin's *Mexico and Central America*, and others are conspicuous because of their absence from his extensive bibliography. The absence of the first three might be excused because of their newness, but not of the others.

Although not published until 1923, his book was practically completed in 1919, the author explains, and none of the events considered are carried beyond the conclusion of the World War. This is especially noticeable and especially regrettable in the statistics given in the very useful chapter on commercial intercourse and in the tables of the appendix, in which few facts subsequent to 1917 are included. The two maps occupying pages 194 and 195, which show the diplomatic and consular posts of the United States, are of the year 1914. These could very easily have been brought down to date. The graphic presentation on page 228 of the history of trade from 1821 to 1917 is worthy of special mention. This chapter and the following on industrial enterprises of United States citizens in the southern countries will be especially welcomed by students and teachers of foreign trade.

The author says his book "may be designated as a series of studies about relations between the United States and the Hispanic-American nations." It is in no sense a complete history of the relations between the United States and the other American republics; but it does study in great detail some of the important phases of and episodes in the diplomatic relations of the American nations. However, equally important episodes and phases have been overlooked, or intentionally omitted, or possibly crowded out. The war between the United States and Mexico is dismissed with half of a sentence, concluding with the comment "an event the consideration of which is excluded from the scope of this volume", which provokes the inquiry: Why? His study of the interpretations and applications of the Monroe Doctrine starts with the French intervention in Mexico.

In the first chapter, on the "Age of Transition," the author reviews very briefly the colonial and revolutionary periods. The second entitled the "Foundation of International Intercourse" studies the sending, first of quasi-diplomatic agents, and the later establishment of regular diplomatic

missions. The subject matter of the third chapter, the political influence of the United States, would have been more evident if he had called it the influence of United States political thought on the governmental institutions of the other American nations. Under the title, "Mediation, Arbitration and Diplomatic Adjustments," are studied a few of the well meant, but unfortunately not always well executed or well received, efforts of the United States to promote the peaceful settlement of international controversies. The last three chapters study, respectively, educational contact, geographic explorations, and Pan-Americanism.

In commenting upon his use of certain terms he says: "As the residents of Hispanic America have as much right to consider themselves Americans as have citizens of the United States, I have aimed to refrain from using the term Americans exclusively for my own countrymen." The success with which he has lived up to his aim shows that the people of this country could, and the reviewer believes they should, dispense entirely with this bit of domineering egotism, which is sometimes conscious and sometimes unconscious on our part but always offensive to, though usually overlooked by, our sensitive but polite neighbors. Another term on his use of which he comments is the adjective Hispanic. In justification of his adoption of it he says there has recently been shown a tendency to substitute it for the formerly generally used adjective Latin to denote the nations of America which owe their origin to the Latin countries of Europe. The reviewer disapproves the author's choice in this regard quite as heartily as he approves the author's use of the adjective American. To a Brazilian the term Hispanic America excludes his own country and means the same as Spanish America, the two English adjectives being translated into the same Portuguese adjective, which resembles *Hispanic* much more closely than it does *Spanish*. The reviewer admits with regret that, as the author says, there has recently been shown by some students of history in the United States a growing tendency to adopt the less used, less desirable term, but that this tendency is marked he does not concede. He hopes and believes it will prove to have been a shortlived fad. The term Latin America is capable of misinterpretation with reference to its inclusion or exclusion; but it is less erroneous than Hispanic America, and carries with it no offense or national slight or implication, in the absence of evidence to the contrary, that the user is ignorant of the fact that Brazil is not a Spanish country. The fact emphasized by advocates of the use of the term Hispanic that it is derived from the Latin name Hispania, which was applied to the region now occupied by both Spain and Portugal, explains but does not justify their choice. The value of Dr. Robertson's book is of course not seriously impaired by his adoption of this adjective; but his use of the term unfortunately lends to it prestige that it does not deserve.

WILLIAM R. MANNING.

Economic Imperialism and International Relations During the Last Fifty Years. With bibliography and index. By Achille Viallate. The Institute of Politics Publications. New York: The Macmillan Company, 1923. pp. xv, 180. $2.00.

The chief merit of this little volume lies in the conciseness with which it reviews the more important events of world politico-economics as they have affected international relations during the last half century. Professor Viallate is a member of the faculty of the *École Libre des Sciences Politiques* (Paris). The tone and content of the present work show him to be an exponent of liberal world politics. To studies necessary for the preparation of previous books, several of which deal with American problems, may doubtless be accredited the comprehensiveness of the lectures which he delivered during the first session of the Institute of Politics (Williamstown, 1921), which lectures are now published under the title given above.

In introducing his subject Professor Viallate presents an outline in high relief of the discoveries, inventions and new business methods born of the latter eighteenth and the nineteenth centuries, one result of which has been the development of interdependence among the nations. The growth of economic unity was obstructed by national self-consciousness and consequent rivalries, but the process continued until the outbreak of the World War.

The most important political result of this economic transformation, we are told in the course of brief concluding remarks, is the present impossibility of an economically independent life for civilized nations. At the close of the eighteenth century the nations were able to live by themselves. Today an important curtailment of exchanges between countries seriously interferes with the well-being of their peoples, unbalances their economic systems and endangers their political stability. The world's war experience was rich in evidence of the essential solidarity that binds the nations together.

The book is divided into two parts, entitled respectively "Growth of Industrialism. Expansion. Ententes and Alliances" (Chapters I–V) and "The War and its Consequences" (Chapters VI–VII). It presents a wealth of facts, widespread public understanding of which would doubtless take the world far along the way toward that replacement of political sentimentalities by economic realities—in behalf of which a very convincing argument is set forth.

Criticism may be made of isolated passages in respect to both emphasis and content, but as a whole the book evokes appreciative commendation.

WALLACE MCCLURE.

The Cambridge History of British Foreign Policy, 1783–1919. Edited by Sir A. W. Ward and G. P. Gooch. New York: The Macmillan Company, 1923. pp. 688.

Volume II of the *Cambridge History of British Foreign Policy* (which work is to be complete in three volumes), deals with the period between 1815 and 1866. It is edited by Sir A. W. Ward and G. P. Gooch, and is divided into fifteen sections contributed by thirteen historians, all of whom, as was explained in the announcement when the first volume was published, are "British subjects by birth," the "aim being to produce a connected narrative which, though adhering strictly to historical truth, shall be written from a national point of view."

It is stated that the "avowed policy" of England since William III has been "to hold in her hands the balance of power" and "to keep it in equilibrium"; and that "the insular position of England, unassailable herself and aiming at no conquest on the Continent has enabled her to play with success the part of *Puissance Mediatrice* of Europe."

The application of this policy of mediation to the immediate Napoleonic post-war problems is particularly interesting in view of the similarity of the problems resulting from the World War of 1914–1918. The problems of a century ago included: relief of the finances of Europe, reduction of armament, withdrawal of troops of occupation from France, the indemnity to be paid by France, the Turkish question, prevention of the extension of the written constitutional form of government to Europe, uprisings in Naples (Italy) and Spain to found governments based on written constitutions, recognition of the newly created republican governments in the former Spanish colonies on the American Continents, etc., and also the attempt of the Czar of Russia to establish and maintain a league of the Christian Powers, to be known as the Holy Alliance, "having for its aim the guarantee of all recognized rights."

The first two chapters, namely "Great Britain and the Continental Alliances of 1816–1822" contributed by Professor W. Alison Phillips, and "The Foreign Policy of Canning 1820–1827" by H. W. V. Temperly, contain an account of the efforts of the British Government "to reëstablish a 'just equilibrium' in Europe after the downfall of Napoleon"; "to bring back the world to peaceful habits;" and to avoid "Continental entanglements".

The insistence of the Czar of Russia upon the establishment and maintenance of the Holy Alliance complicated the situation for the British Cabinet in dealing with the post-war problems, because the opposition of the people and parliament to "Continental entanglements" prevented Great Britain from joining the Holy Alliance. To some of the conferences of the Holy Alliance, however, the British Government sent a representative, who was "merely instructed to watch the proceedings on behalf of his Government," (p. 37), but all the important questions were referred for settlement to the "Council of Ambassadors", under the Treaty of Vienna, on which Great Britain was officially represented. Finally, after more than seven years of

such diplomatic maneuvering, the British Secretary of Foreign Affairs, Canning, having failed to make an alliance with the United States, welcomed the pronouncement by the United States of the Monroe Doctrine as a curb on the aims of the Holy Alliance, and took credit to himself for having "called the New World into existence to redress the balance of the Old."

The British attitude toward the Monroe Doctrine is very illuminatingly described, presumably from the British "national point of view"; and it is stated that "one of Canning's bugbears was the formation of a General Transatlantic League of Republics against a European League of Monarchies" (p. 65); and that his "great fear was that the United States would head a 'General Transatlantic League' to prevent Europe from coöperating with America, or America from coöperating with Europe;" (p. 73) and that Canning's policy nullified the effect of the Monroe Doctrine on the American Continent, and at his death the Latin American Republics looked "towards Great Britain and not to the United States" as "a mighty, a distant, a disinterested, and a powerful Protector" (p. 77).

Equally interesting and instructive is the application of the British foreign policy to complicated international situations arising in subsequent years, as described in this volume, which contains the following sections: "Belgium, 1830–1839" contributed by G. W. T. Omond; "The Near East and France 1829–1847" by G. B. Mowat; "India and the Far East, 1833–1849" by G. P. Moriarty; "United States and Colonial Developments, 1815–1846", and "Anglo-American Relations During the Civil War, 1860–1865" by A. P. Newton; "The European Revolution and After, 1848–1854" by F. J. C. Hearnshaw; "The Crimean War and the French Alliance, 1853–1858" by W. F. Reddaway; "India and the Far East, 1848–1858" by F. W. Buckler; "The Franco-Italian War, Syria and Poland, 1859–1863" by Rachael R. Reid; "Commercial Relations, 1828–1865" by J. H. Clapham; "The French Commercial Treaty of 1860" by E. A. Benians; "The Schleswig-Holstein Question, 1852–1866", and "Greece and the Ionian Islands, 1832–1864" by Sir A. W. Ward.

The effect of the application of the British policy of mediation, as demonstrated in this volume, seems to be to play State X against State Y, so that each will seek the friendship of Great Britain, and will countenance British commercial expansion, and Empire building policies in territories outside of Europe.

The contributors to this volume have had access to the archives of the British Foreign Office, and the majority have used source material. There is appended to this volume, as Appendix A, the text of "Lord Castlereagh's Confidential State Paper of May 5th, 1820"; as Appendix B, "The Suppressed Parts of the Polignac Memorandum, October 9th, 1823"; as Appendix C, communications relating to the Turkish question, Tahiti, and the Spanish marriages; and as Appendix D "Lord Cowley's Memorandum Relative to the Present and Future State of Turkey, March 1856."

It is to be regretted that all the documents referred to in the footnotes from which statements are quoted and which are only available in the archives of the Foreign Office, have not been printed in full as an appendix to this volume.

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PERIODICAL LITERATURE ON INTERNATIONAL LAW SUBJECTS[1]

Abbreviations: American Bar Association Journal (*Amer. Bar Ass. J.*); American Law Review (*Amer. L. R.*); American Political Science Review (*Amer. Pol. Sc. R.*); Archiv des öffentlichen Rechts (*Arch. d. öffentl Rechts*); British Year Book (*Br. Y. Book*); Bulletin de l'Institut Belge de Droit Comparé (*B. Inst. Belge Dr. Comp.*); Bulletin Mensuel de la Société de Législation Comparée (*B. M. Légis. Comp.*); Canadian Bar Review (*Can. Bar R.*); Die Freidens-Warte (*Fried. Warte*); Foreign Affairs (*For. Aff.*); Harvard Law Review (*Harvard L. R.*); Hispanic American Historical Review (*Hispanic Amer. Hist. R.*); Journal of American Institute of Criminal Law and Criminology (*J. Crim. L.*); Journal of Comparative Legislation and International Law (*J. Comp. Legis. Inter. L.*); Juridical Review (*Jur. R.*); Law Quarterly Review (*Law Quar. R.*); League of Nations Monthly Summary (*L. N. M. S.*); North American Review (*N. Amer. R.*); Revista de Ciencias Económicas (*R. Ciencias Econ.*); Revista de la Facultad de Derecho y Ciencias sociales (*R. Fac. Der.*); Revista de Direito Publico e de Administracão Federal, Estadual e Municipal (Brazil) (*Rev. de Dir. Pub.*); Revista Mexicana de Derecho Internacional (*Rev. Mex. Der. Int.*); Revue de Droit International et de Législation Comparée (*R. Dr. Int. et Lég. Comp.*); Revue de Droit International Privé et de Droit Pénal International (*R. Dr. Int. Privé et Dr. Pénal Int.*); Revue Générale de Droit International Public (*R. Gén. Dr. Int. Public*); Revue International du Droit Maritime (*R. Int. Dr. Maritime*); Revista di Diritto Internazionale (*R. Diritto Inter.*); University of Pennsylvania Law Review (*Pa. U. L. R.*); Yale Law Journal (*Yale L. J.*); Zeitschrift für Internationales Recht (*Zeits. Int. Recht*); Zeitschrift für Völkerrecht (*Zeits. für Völkerrecht*).

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